RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN 24 2017
OFFICE OF THE CLERK

Nos. 16-74, 16-86, and 16-258

In the Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, ET AL.,
PETITIONERS
v.
MARIA STAPLETON, ET AL.

SAINT PETER'S HEALTHCARE SYSTEM, ET AL.,
PETITIONERS
v.
LAURENCE KAPLAN

DIGNITY HEALTH, ET AL., PETITIONERS
v.
STARLA ROLLINS

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD, SEVENTH, AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

EDWIN S. KNEEDLER
Deputy Solicitor General
Counsel of Record
JOYCE R. BRANDA
Acting Assistant Attorney General
BRIAN H. FLETCHER
Assistant to the Solicitor General
MARK B. STERN
ALISA B. KLEIN
NICOLAS Y. RILEY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Additional Counsel Listed on Inside Cover

Library of Congress

ROBERT J. NEIS
Benefits Tax Counsel
Department of the Treasury
Washington, D.C. 20220

DEBRA K. MOE
Deputy Chief Counsel
(Operations)
Internal Revenue Service
Washington, D.C. 20224

KATHERINE E. BISSELL
Deputy Solicitor for
Regional Enforcement
Department of Labor
Washington, D.C. 20210

JUDITH R. STARR
General Counsel
Pension Benefit Guaranty
Corporation
Washington, D.C. 20005

QUESTION PRESENTED

Whether an employee benefit plan must be initially established by a church in order to qualify for the "church plan" exemption to the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(33).

TABLE OF CONTENTS

Page

Interest of the United States 1
Statutory provisions involved 2
Statement 2
A. ERISA's original church-plan exemption 2
B. The MPPAA's expansion of the church-plan exemption 4
C. The present controversy 8
Summary of argument 10
Argument:
The IRS, DOL, and PBGC have correctly concluded that a plan need not be established by a church to qualify as a church plan 13
A. The agencies' longstanding interpretation reflects the natural reading of the statutory text 14
B. The agencies' longstanding interpretation is supported by the context, history, and purpose of the MPPAA amendments 18
C. The agencies' longstanding interpretation warrants deference under *Skidmore* 24
D. There is no sound reason to reject the agencies' longstanding interpretation and impose a church-establishment requirement 30
Conclusion 34
Appendix — Statutory and regulatory provisions 1a

TABLE OF AUTHORITIES

Cases:

Abramski v. *United States*, 134 S. Ct. 2259 (2014) 18
Alaska Dep't of Envtl. Conservation v. *EPA*, 540 U.S. 461 (2004) 26, 27
Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 16

Cases—Continued: Page

Barnhart v. *Walton*, 535 U.S. 212 (2002) 26
Beck v. *Pace Int'l Union*, 551 U.S. 96 (2007) 27
CFTC v. *Schor*, 478 U.S. 833 (1986) 29
Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. *Amos*, 483 U.S. 327 (1987) 33
Donovan v. *Dillingham*, 688 F.2d 1367 (11th Cir. 1982) 30
Federal Express Corp. v. *Holowecki*, 552 U.S. 389 (2008) 26
NLRB v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979) 33
Mead Corp. v. *Tilley*, 490 U.S. 714 (1989) 26, 27
Medina v. *Catholic Health Initiatives*, No. 13-cv-1249, 2014 WL 4244012 (D. Colo. Aug. 26, 2014) 9
Mertens v. *Hewitt Assocs.*, 508 U.S. 248 (1993) 2, 26
Overall v. *Ascension*, 23 F. Supp. 3d 816 (E.D. Mich. 2014) 9, 15
Power Reactor Dev. Co. v. *International Union of Elec.*, 367 U.S. 396 (1961) 26
Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. *Hendon*, 541 U.S. 1 (2004) 27
Rose v. *Long Island R.R. Pension Plan*, 828 F.2d 910 (2d Cir. 1987), cert. denied, 485 U.S. 936 (1988) 32
Ross v. *Blake*, 136 S. Ct. 1850 (2016) 14
Sebelius v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817 (2013) 29
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 12, 25, 26
Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) 2
TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 17
Udall v. *Tallman*, 380 U.S. 1 (1965) 26
United States v. *Mead Corp.*, 533 U.S. 218 (2001) 26

Cases—Continued: Page

United States v. *Menasche*, 348 U.S. 528 (1955) 17
Williams v. *Taylor*, 529 U.S. 362 (2000) 11, 17
Williams v. *WCI Steel Co.*, 170 F.3d 598 (6th Cir. 1999) 31
Yates v. *Hendon*, 541 U.S. 1 (2004) 3
Zenith Radio Corp. v. *United States*, 437 U.S. 443 (1978) 26

Constitution, statutes and regulations:

U.S. Const. Amend. I (Establishment Clause) 33
Act of July 10, 2000, Pub. L. No. 106-244, 114 Stat. 499 27
Act of Dec. 21, 2004, Pub. L. No. 108-476, § 1(a), 118 Stat. 3901 29
Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 336, 129 Stat. 3109-3113 27
§ 336(c), 129 Stat. 3111 27
Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 10001, 100 Stat. 223 28
Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 659, 115 Stat. 139 28
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* 1, 3
29 U.S.C. 1002(1)-(3) 2
29 U.S.C. 1002(16)(B) 31
29 U.S.C. 1002(33) 3
29 U.S.C. 1002(33)(A) (1976) 3, 14
29 U.S.C. 1002(33)(A) ..... *passim*
29 U.S.C. 1002(33)(C) (1976) 4, 18
29 U.S.C. 1002(33)(C)(i) ..... *passim*
29 U.S.C. 1002(33)(C)(ii)(II) 6, 7, 14, 32

Statutes and regulations—Continued: Page

29 U.S.C. 1002(33)(C)(iii) 6, 7, 15
29 U.S.C. 1003(a) 3
29 U.S.C. 1003(b)(2) 3
29 U.S.C. 1058 31
29 U.S.C. 1132-1135 ..... 2, 25
29 U.S.C. 1144a 28
29 U.S.C. 1201 *et seq.* 3
29 U.S.C. 1301 *et seq.* 3
29 U.S.C. 1302(b)(3) 2, 25
29 U.S.C. 1321(b)(3) 3, 8
Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 402, 110 Stat. 2084-2085 28
Internal Revenue Code:
26 U.S.C. 410(c)(1)(B) 3
26 U.S.C. 410(d) 3
26 U.S.C. 411(e)(1)(B) 3
26 U.S.C. 412(e)(2)(D) 3
26 U.S.C. 414(e) 3, 8
26 U.S.C. 414(e)(1) 7
26 U.S.C. 414(e)(3)(A) (1976) 4
26 U.S.C. 414(e)(3)(A) 4, 7, 16, 29
26 U.S.C. 414(e)(3)(B)(ii) 7
26 U.S.C. 414(e)(3)(C) 7
26 U.S.C. 414(*l*) 31
26 U.S.C. 501 ..... 6, 14
26 U.S.C. 4980D(b)(3)(C) 28
26 U.S.C. 4980F(f)(2) 28
26 U.S.C. 7801(a) 2, 25
26 U.S.C. 9802(c) 28
26 U.S.C. 9802(f) 28

Statutes and regulations—Continued: Page

Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 407, 94 Stat. 1303 5
§ 407(c), 94 Stat. 1307 6
National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 508, 110 Stat. 3447 28
Social Security Protection Act of 2004, Pub. L. No. 108-203, § 422, 118 Stat. 536 28
Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1532, 111 Stat. 1085 28
42 U.S.C. 411(a)(7) 28
26 C.F.R. 1.414(e)-1 8

Miscellaneous:

124 Cong. Rec. (May 2, 1978):
p. 12,107 ..... 19, 21, 22
p. 12,108 23
125 Cong. Rec. (May 7, 1979):
p. 10,052 ..... 11, 81, 20, 22, 32
p. 10,053 21
126 Cong. Rec. (July 29, 1980):
p. 20,208 ..... 6, 18, 32
p. 20,180 18
149 Cong. Rec. 7380 (Mar. 25, 2003) 29
150 Cong. Rec. 24,328-24,331 (Nov. 19, 2004) 29
DOL Advisory Op. No. 2000-05A, 2000 WL 744359 (May 17, 2000) 8, 25
Exec. Sess. of the Senate Comm. on Finance, 96th Cong., 2d Sess. (June 12, 1980) 18, 32
45 Fed. Reg. 20,796 (Mar. 31, 1980) 8
H.R. 12,172, 95th Cong., 2d Sess. (1978) 23
IRS GCM 37,266, 1977 WL 46200 (Sept. 22, 1977) 4, 6. 7. 23

Miscellaneous—Continued: Page

IRS GCM 39,007, 1983 WL 197946 (Nov. 2, 1982) 6, 7, 25, 26
IRS GCM 39,793, 1989 WL 592761 (July 6, 1989) 8, 25
Miscellaneous Pension Bills: Hearings Before the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the Senate Comm. on Finance, 96th Cong., 1st Sess. (1979) ..... *passim*
PBGC, 2011 Enrolled Actuaries Meeting, Questions to the PBGC and Summary of Their Responses (Mar. 2011), http://www.pbgc.gov/documents/2011bluebook.pdf. 8
S. 1076, 96th Cong., 1st Sess. (1979) 6, 18, 32
S. 1090, 96th Cong., 1st Sess. (1979) 23
S. Rep. No. 383, 93d Cong., 1st Sess. (1973) 3

In the Supreme Court of the United States

No. 16-74

ADVOCATE HEALTH CARE NETWORK, ET AL., PETITIONERS

v.

MARIA STAPLETON, ET AL.

No. 16-86

SAINT PETER'S HEALTHCARE SYSTEM, ET AL., PETITIONERS

v.

LAURENCE KAPLAN

No. 16-258

DIGNITY HEALTH, ET AL., PETITIONERS

v.

STARLA ROLLINS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD, SEVENTH, AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

These cases concern the "church plan" exemption to the Employee Retirement Income Security Act of

1974 (ERISA), 29 U.S.C. 1001 *et seq.* The Internal Revenue Service (IRS), the Department of Labor (DOL), and the Pension Benefit Guaranty Corporation (PBGC) administer the relevant provisions of ERISA. 26 U.S.C. 7801(a); 29 U.S.C. 1132-1135, 1302(b)(3). The decisions below rejected an interpretation those agencies have applied for more than three decades. The United States therefore has a substantial interest in this Court's resolution of the question presented.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-24a.

STATEMENT

ERISA generally exempts "church plans," a term defined broadly to encompass a plan covering the employees of a religious hospital or other tax-exempt organization associated with a church. The question presented is whether such a plan must be initially "established" by the church itself (as the decisions below held) or whether it is sufficient if the plan is "maintained" by a church-affiliated organization described in the statute (as the IRS, DOL, and PBGC have long concluded).

A. ERISA's Original Church-Plan Exemption

1. Enacted in 1974, ERISA is a "comprehensive and reticulated statute" regulating employee benefit plans. *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (citation omitted). ERISA governs both pension plans and welfare plans providing health, disability, and other benefits. *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 91-92 (1983); see 29 U.S.C. 1002(1)-(3).

ERISA has four titles. Title I imposes reporting and disclosure requirements, standards of fiduciary conduct, vesting and funding schedules, and other substantive rules for pension and welfare plans. 29 U.S.C. 1001 *et seq.* Title II, which is codified in the Internal Revenue Code, conditions preferential tax treatment for pension plans on compliance with certain Title I requirements. Title III governs administration and enforcement. 29 U.S.C. 1201 *et seq.* And Title IV establishes the PBGC, which administers an insurance program that protects employees against the loss of benefits if an employer's pension plan terminates with insufficient funds. 29 U.S.C. 1301 *et seq.*; see *Yates* v. *Hendon*, 541 U.S. 1, 6 (2004).

2. ERISA generally applies to any benefit plan "established or maintained" by a private employer. 29 U.S.C. 1003(a). But Congress exempted "church plans," in part because "the examinations of books and records" required under ERISA "might be regarded as an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities." S. Rep. No. 383, 93d Cong., 1st Sess. 81 (1973). Unless a church plan elects to be covered under 26 U.S.C. 410(d), it is exempt from Title I of ERISA, from certain related tax provisions, and from the PBGC's insurance program. 29 U.S.C. 1003(b)(2), 1321(b)(3); see, *e.g.*, 26 U.S.C. 410(c)(1)(B), 411(e)(1)(B), 412(e)(2)(D).

The term "church plan" is defined in 29 U.S.C. 1002(33) and a materially identical provision of the Internal Revenue Code, 26 U.S.C. 414(e). As originally enacted in 1974, that definition was narrow, including only a plan "established and maintained for its employees by a church." 29 U.S.C. 1002(33)(A)

(1976).[1] Congress also adopted a temporary rule specifying that an existing plan covering church employees could be "treated as a church plan" even if it also covered the employees of "one or more agencies" of the church. 29 U.S.C. 1002(33)(C) (1976); see 26 U.S.C. 414(e)(3)(A) (1976). That rule allowing the employees of church agencies to be included in exempt plans was set to expire in 1982. *Ibid.*

3. In 1977, the IRS issued a General Counsel Memorandum (GCM) applying the church-plan definition to pension plans established by two orders of Catholic sisters for the employees of their hospitals. IRS GCM 37,266, 1977 WL 46200, at *1-*2 (Sept. 22, 1977) (1977 GCM). The IRS concluded that the plans were not church plans because the orders were not themselves "churches." *Id.* at *6. The IRS reasoned that a religious order qualifies as a "church" only if it is "principally engaged in religious activities." *Id.* at *3, *6. And the IRS determined that the Catholic orders at issue were not churches because "operating hospitals * * * is not a religious function." *Id.* at *5.

B. The MPPAA's Expansion Of The Church-Plan Exemption

1. A broad coalition of religious organizations formed the Church Alliance for the Clarification of ERISA (Church Alliance) to seek changes to the original church-plan exemption. *Miscellaneous Pension Bills: Hearings Before the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the*

---

[1] Like the courts below and the parties, we generally cite the church-plan definition in ERISA rather than the materially identical definition in the Internal Revenue Code. For brevity, we generally use the term "church" as a shorthand for the statutory phrase "church or convention or association of churches."

Senate Comm. on Finance, 96th Cong., 1st Sess. 363-364, 366 (1979) (*Senate Hearing*) (Sen. Talmadge). Among other things, the Church Alliance opposed the sunset of the temporary rule allowing church plans to cover the employees of church agencies. *Id.* at 384, 387-388 (Church Alliance). It also argued that the original definition's focus on plans established and maintained by "churches" favored hierarchical denominations over congregational denominations, which typically relied on separate pension boards to administer the plans covering the employees of local churches and church agencies. *Id.* at 383, 388. And the Church Alliance opposed government inquiries aimed at determining whether particular entities were sufficiently religious to qualify as "churches" entitled to establish and maintain exempt plans. *Id.* at 384.

Congress responded to those concerns by substantially expanding ERISA's church-plan exemption in the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, § 407, 94 Stat. 1303. The MPPAA amendments preserved the core of the original definition, continuing to provide that "[t]he term 'church plan' means a plan established and maintained * * * for its employees (or their beneficiaries) by a church." 29 U.S.C. 1002(33)(A). That approach made clear that any plan that met the original definition remained exempt. But Congress broadened the exemption by adopting provisions deeming additional plans to satisfy that definition even though they did not fall within its literal terms. Two of those provisions are relevant here.

First, Congress specified that, for purposes of the church-plan definition, "[t]he term employee of a church * * * includes * * * an employee of an

organization, whether a civil law corporation or otherwise, which is exempt from tax under [26 U.S.C. 501] and which is controlled by or associated with a church." 29 U.S.C. 1002(33)(C)(ii)(II). A separate provision provides that "[a] church * * * shall be deemed the employer of any individual included as an employee" under that rule. 29 U.S.C. 1002(33)(C)(iii). Those provisions allow "a church plan to cover employees of a tax-exempt agency controlled by or affiliated with a church," such as a religious hospital. 126 Cong. Rec. 20,208 (July 29, 1980) (Joint Explanation of S. 1076, 96th Cong., 1st Sess. (1979)).

Second, Congress addressed the concerns of congregational denominations by specifying that "[a] plan established and maintained for its employees (or their beneficiaries) by a church"—that is, a church plan—"includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan * * * for the employees of a church * * * if such organization is controlled by or associated with a church." 29 U.S.C. 1002(33)(C)(i). Under that provision, a plan maintained by a church-affiliated pension board or other "principal-purpose" organization is deemed to be a church plan.

Congress made the MPPAA amendments retroactive to January 1, 1974, ensuring that plans previously excluded from the church-plan exemption would not be liable for any failure to comply with ERISA. MPPAA § 407(c), 94 Stat. 1307.

2. The IRS first addressed the amended church-plan definition in a GCM prepared in 1982 and released to the public in 1983. IRS GCM 39,007, 1983 WL 197946 (Nov. 2, 1982) (1982 GCM). Like the 1977

GCM, the 1982 GCM addressed pension plans established by Catholic religious orders for the employees of their hospitals. *Id.* at *1-*2. The IRS explained that, under the approach adopted in the 1977 GCM, the orders were not themselves "churches." *Id.* at *4. But the IRS concluded that the MPPAA amendments meant that "nonchurch status is not fatal." *Ibid.* After parsing the amended definition, the IRS explained that the orders' plans would qualify as church plans so long as (a) "their employees are deemed employees of the Catholic Church," and (b) their plans are "administered by one of the organizations described in the statute." *Ibid.*

The IRS found both requirements satisfied. It explained that the religious orders' employees were deemed to be employees of the Catholic Church because the orders were associated with the Church. 1982 GCM at *5; see 26 U.S.C. 414(e)(3)(B)(ii) and (C); 29 U.S.C. 1002(33)(C)(ii)(II) and (iii). And it concluded that a plan may qualify as a church plan under the MPPAA amendments if it is *either* "established and maintained * * * by a church," 26 U.S.C. 414(e)(1); see 29 U.S.C. 1002(33)(A), *or* "maintained" by a principal-purpose organization, 26 U.S.C. 414(e)(3)(A); see 29 U.S.C. 1002(33)(C)(i). 1982 GCM at *5. The IRS therefore determined that, although the orders' plans had not been established by a church, they would qualify as church plans so long as they were maintained by principal-purpose organizations. *Id.* at *5-*6.

3. In the decades since the 1982 GCM, the IRS has issued hundreds of private letter rulings confirming the exempt status of particular plans based on its conclusion that a plan maintained by a principal-purpose organization need not be "established" by a

church to qualify as a church plan. See No. 16-74 (*Advocate*) Pet. App. 70a-111a (collecting citations); see also IRS GCM 39,793, 1989 WL 592761, at *5-*7 (July 6, 1989) (reaffirming this interpretation).[2]

DOL has likewise concluded that the identical definition in Title I of ERISA does not require a church to establish a church plan in the first instance. That interpretation is reflected in dozens of DOL opinion letters finding particular plans exempt. See, *e.g.*, DOL Advisory Op. No. 2000-05A, 2000 WL 744359, at *1 (May 17, 2000); see also *Advocate* Pet. App. 64a-69a (collecting citations). The PBGC has similarly adopted the IRS's interpretation, relying on the IRS to determine whether particular plans qualify as church plans. PBGC, *2011 Enrolled Actuaries Meeting, Questions to the PBGC and Summary of Their Responses* 25 (Mar. 2011), http://www.pbgc.gov/documents/2011bluebook.pdf; see 29 U.S.C. 1321(b)(3) (incorporating 26 U.S.C. 414(e)).

C. The Present Controversy

1. Until recently, no court had questioned the agencies' longstanding interpretation of the church-plan exemption. Since 2013, however, that interpretation has been challenged in dozens of class-action suits filed by employees of religious hospitals and healthcare providers. Petitioners are the defendants in three of those suits. Respondents are current and former employees at petitioners' healthcare facilities who allege that petitioners' pension plans are subject

---

[2] The IRS and the Department of the Treasury issued a regulation interpreting the original church-plan definition, but that regulation has not been updated to address the MPPAA amendments. 26 C.F.R. 1.414(e)-1; see 45 Fed. Reg. 20,796 (Mar. 31, 1980).

to ERISA and that those plans do not satisfy ERISA's funding, vesting, disclosure, and other requirements. As relevant here, respondents contend that petitioners' plans do not qualify as church plans because the plans were not established by a church. *Advocate* Pet. App. 4a-5a; No. 16-86 (*St. Peter's*) Pet. App. 6a-7a; No. 16-258 (*Dignity*) Pet. App. 4a-6a.

The district courts denied petitioners' motions to dismiss, agreeing with respondents that a plan must be established by a church to be a church plan. *Advocate* Pet. App. 30a-50a; *St. Peter's* Pet. App. 29a-51a; *Dignity* Pet. App. 26a-42a. All three courts then certified the issue for interlocutory appeal, recognizing that other district courts had reached the opposite conclusion. *Advocate* Pet. App. 51a-53a; *St. Peter's* Pet. App. 54a-63a; *Dignity* Pet. App. 61a-72a; see *Overall* v. *Ascension*, 23 F. Supp. 3d 816, 826-829 (E.D. Mich. 2014); *Medina* v. *Catholic Health Initiatives*, No. 13-cv-1249, 2014 WL 4244012, at *2-*3 (D. Colo. Aug. 26, 2014).

2. The courts of appeals affirmed. *Advocate* Pet. App. 1a-29a; *St. Peter's* Pet. App. 1a-26a; *Dignity* Pet. App. 1a-25a.

The first appellate decision was issued by the Third Circuit, which concluded that, under the "plain text" of the church-plan definition, "only a church can establish a plan that qualifies for an exemption." *St. Peter's* Pet. App. 6a. The court emphasized that the statute defines a "church plan" as "a plan established and maintained * * * by a church." *Id.* at 9a-10a (quoting 29 U.S.C. 1002(33)(A)). The court recognized that the MPPAA expanded that definition by specifying that a plan "established and maintained * * * by a church * * * includes a plan maintained by" a principal-purpose organization. *Id.* at 11a (quoting 29

U.S.C. 1002(33)(C)(i)). The court concluded that this amendment "provided an alternate way of meeting the maintenance requirement," allowing a principal-purpose organization, rather than a church, to *maintain* an exempt church plan. *Id.* at 13a. But the court held that the MPPAA "did not do away with the requirement that a church *establish* a plan in the first instance." *Ibid.* (emphasis added). The court stated that it found support for that reading in several canons of construction, *id.* at 14a-18a, and in the MPPAA's legislative history, *id.* at 18a-22a. And because the court believed that the agencies' interpretation "is at odds with the statutory text," it gave "no deference" to their longstanding view. *Id.* at 23a.

The subsequent decisions by the Seventh and Ninth Circuits relied on similar reasoning, likewise concluding that the statutory text and legislative history demonstrate that a church plan must be "established" by a church, and likewise declining to defer to the agencies' contrary view. *Advocate* Pet. App. 6a-29a; *Dignity* Pet. App. 7a-24a.

SUMMARY OF ARGUMENT

In 1980, Congress amended ERISA to allow the employees of a religious hospital or other church-affiliated nonprofit organization to be covered by an exempt church plan. Ever since, the agencies responsible for administering ERISA's complex regulatory scheme have consistently concluded that such a plan need not be initially established by a church to qualify as exempt. That longstanding interpretation is correct.

A. The agencies' interpretation is the natural reading of the statutory text. In the MPPAA, Congress preserved ERISA's basic definition of a church plan as a plan "established and maintained * * * by a

church." 29 U.S.C. 1002(33)(A). But Congress expanded that definition by specifying that "[a] plan established and maintained * * * by a church * * * includes a plan maintained by [a principal-purpose organization]." 29 U.S.C. 1002(33)(C)(i). Section 1002(33)(C)(i) is most naturally read to provide that a plan "maintained" by a principal-purpose organization is deemed to be both "established" *and* "maintained" by a church. Any other reading would render the words "established and" superfluous, violating the "cardinal principle of statutory construction" that requires courts to "'give effect, if possible, to every clause and word of a statute.'" *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (citation omitted).

B. The context, history, and purpose of the MPPAA amendments reinforce the natural reading of the text. One of Congress's fundamental goals was to accommodate congregational denominations, which typically relied on pension boards to administer plans covering the employees of local churches and church agencies. That goal could not have been achieved merely by allowing pension boards to maintain plans established by churches. Some pension boards for congregational denominations established their own plans, and in other cases it was unclear which entities had "established" plans that long pre-dated ERISA.

The MPPAA amendments thus sought to eliminate any uncertainty stemming from questions about "whether [a] plan is *established* by a church * * * or by a pension board." 125 Cong. Rec. 10,052 (May 7, 1979) (Sen. Talmadge) (emphasis added). And the drafting history confirms that Congress achieved that objective by deeming a plan maintained by a pension board or other principal-purpose organization to satis-

fy the requirement of church *establishment*, not merely the requirement of church maintenance.

C. If there were any doubt about the best interpretation of the church-plan definition, it would be resolved by the position adopted and consistently applied by the IRS, DOL, and PBGC. Those agencies have been charged by Congress with administering ERISA, and their implementation of the church-plan exemption "constitute[s] a body of experience and informed judgment" entitled to a measure of deference. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Such an administrative interpretation carries special force where, as here, it reflects a contemporaneous and longstanding construction of a complex statutory scheme. And the agencies' oft-applied interpretation of the church-plan definition is entitled to even greater weight because Congress has left it undisturbed even as it has repeatedly refined the treatment of church plans under ERISA, the Internal Revenue Code, and related laws.

D. Neither respondents nor the courts of appeals identified any sound reason to upset decades of reliance interests by imposing a requirement that a church plan be initially "established" by a church. The courts appeared to assume that such a requirement would ensure that a church retained control of or responsibility for the plan, but that is mistaken. Those powers and responsibilities may fall on the entity that *maintains* a plan, not the entity that established it in the first instance.

Respondents have also suggested that Congress did not intend to exclude the employees of large healthcare providers like petitioners from ERISA's protections. But the MPPAA amendments unambigu-

ously allow the employees of any tax-exempt organization controlled by or associated with a church to be covered under an exempt church plan—indeed, Congress expressly deemed such employees to be employees of a church. There is thus no dispute that the employees of a church-affiliated nonprofit organization can be covered under an exempt plan—the only question is the mechanism by which that result may be achieved. As the administering agencies have long concluded, Congress did not require a church to establish such a plan in the first instance.

ARGUMENT

THE IRS, DOL, AND PBGC HAVE CORRECTLY CONCLUDED THAT A PLAN NEED NOT BE ESTABLISHED BY A CHURCH TO QUALIFY AS A CHURCH PLAN

There is no dispute that the employees of a religious hospital or other nonprofit organization associated with a church may be covered under an ERISA-exempt church plan. There is also no dispute that a church plan need not be "maintained" by a church, and may instead be maintained by an organization the principal purpose of which is the administration or funding of a church plan. The only question before the Court is whether an otherwise-qualifying plan maintained by a principal-purpose organization must be "established" by a church in the first instance. As the agencies responsible for administering ERISA have concluded for more than three decades, the answer to that question is no.[3]

---

[3] The courts of appeals held that petitioners' plans are not church plans because they were not "established" by a church. Respondents have separately argued that petitioners' plans are not church plans because petitioners are not controlled by or

A. The Agencies' Longstanding Interpretation Reflects The Natural Reading Of The Statutory Text

Like any inquiry into the meaning of a federal statute, the interpretation of ERISA's church-plan exemption "begins with the text." *Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016). That text is most naturally read to provide that a plan maintained by a principal-purpose organization described in Section 1002(33)(C)(i) qualifies as a church plan whether or not it was initially established by a church.

1. Since its enactment in 1974, ERISA has defined a "church plan" as a plan "established and maintained * * * for its employees * * * by a church." 29 U.S.C. 1002(33)(A); see 29 U.S.C. 1002(33)(A) (1976). In the MPPAA, however, Congress enacted amendments that expanded the reach of that definition beyond its literal terms. Two of those amendments combine to allow a plan covering the employees of a religious hospital or other church-affiliated organization to qualify as a church plan even if the plan was not established by a church.

First, Congress specified that "[t]he term employee of a church" includes "an employee of an organization * * * which is exempt from tax under [26 U.S.C. 501] and which is controlled by or associated with a church." 29 U.S.C. 1002(33)(C)(ii)(II). Congress further provided that, for purposes of the church-plan

---

associated with a church and because the entities that maintain petitioners' plans do not qualify as principal-purpose organizations under Section 1002(33)(C)(i). *Advocate* Br. in Opp. 36-37; *St. Peter's* Br. in Opp. 28-30; *Dignity* Br. in Opp. 36-38. We do not address those separate issues because they were not passed upon by the courts of appeals and are not encompassed within the question presented.

definition, "[a] church * * * shall be deemed the employer" of such employees. 29 U.S.C. 1002(33)(C)(iii). Thus, a plan providing benefits for the employees of a tax-exempt organization controlled by or associated with a church qualifies as a plan providing benefits for the employees of a "church."

Second, Congress enacted Section 1002(33)(C)(i) to address plans maintained by pension boards or other principal-purpose organizations. That provision specifies that "[a] plan established and maintained for its employees * * * by a church * * * includes a plan maintained by [a principal-purpose organization]." 29 U.S.C. 1002(33)(C)(i). That provision is naturally read to provide that a plan "maintained" for church employees by a principal-purpose organization is deemed to be a plan "established and maintained for its employees * * * by a church"—that is, a church plan. *Ibid.* As one court put the point, "if A is exempt and A includes C, then C is also exempt." *Overall* v. *Ascension*, 23 F. Supp. 3d 816, 828 (E.D. Mich. 2014) (citation omitted). Applying that logic here: Because a plan "established and maintained for its employees * * * by a church" is exempt, 29 U.S.C. 1002(33)(A)—and because such a plan "includes a plan maintained by [a principal-purpose organization]," 29 U.S.C. 1002(33)(C)(i)—it follows that a plan maintained by a principal-purpose organization is also exempt.[4]

---

[4] The same point can be made in a slightly different way. Section 1002(33)(C)(i) states that a phrase in Section 1002(33)(A)'s definition of "church plan" "includes" additional plans described in Section 1002(33)(C)(i). The relevant phrase in Section 1002(33)(A) can therefore be replaced with the text from Section 1002(33)(C)(i), with this result:

That natural reading of Section 1002(33)(C)(i)'s text is reinforced by the title of the materially identical provision of the Internal Revenue Code, 26 U.S.C. 414(e)(3)(A). Cf. *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (observing that "the heading of a section" may resolve doubt over its meaning) (citation omitted). The Internal Revenue Code provision is entitled "[t]reatment as church plan," 26 U.S.C. 414(e)(3)(A), which confirms that the plans described in Section 1002(33)(C)(i) and its Internal Revenue Code counterpart are deemed to be church plans.

2. The courts of appeals adopted a different reading of Section 1002(33)(C)(i). In their view, that provision "provided an alternate way of meeting the *maintenance* requirement" in Section 1002(33)(A)'s original church-plan definition, but "did not do away with the requirement that a church *establish* a plan in the first instance." *St. Peter's* Pet. App. 13a (emphasis added); see *Advocate* Pet. App. 11a-12a; *Dignity* Pet. App. 10a-11a. That reading is unpersuasive.

If Congress had intended to eliminate the "maintenance" requirement alone, it would have provided that

---

> The term "church plan" means [a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches] which is exempt from tax under section 501 of title 26.

29 U.S.C. 1002(33)(A) (text from Section 1002(33)(C)(i) bracketed). The two provisions thus combine to define a "church plan" to include a plan maintained by a principal-purpose organization, whether or not that plan was established by a church.

"a plan *maintained* by a church includes a plan maintained by a principal-purpose organization." But Congress did not do that. Instead, it specified that "[a] plan *established and maintained* * * * by a church * * * includes a plan maintained by [a principal-purpose organization]." 29 U.S.C. 1002(33)(C)(i) (emphasis added). The natural implication is that a plan "maintained" by a principal-purpose organization is deemed to be both "established" and "maintained" by a church. In fact, any other reading would render the words "established and" superfluous, violating "the cardinal principle of statutory construction" that courts "must 'give effect, if possible, to every clause and word of a statute.'" *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (quoting *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955)). The courts of appeals failed even to acknowledge this superfluity, much less to identify any textual consideration sufficient to overcome this Court's "reluctan[ce] to treat statutory terms as surplusage in any setting." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (citation omitted).[5]

---

[5] The Third and Seventh Circuits erroneously assumed that their reading avoided a different surplusage problem. Those courts believed that, under the agencies' interpretation, the "church establishment requirement" in Section 1002(33)(A) "would be superfluous" because even a plan that was not established by a church "would be eligible for an exemption as long as it is maintained by [a principal-purpose organization]." *St. Peter's* Pet. App. 14a; see *Advocate* Pet. App. 11a-12a. But that consequence does not render Section 1002(33)(A) "superfluous." Just as before the MPPAA, Section 1002(33)(A) exempts plans that are both established *and* maintained by a church. Section 1002(33)(C)(i), in contrast, exempts only plans maintained by principal-purpose organizations; it does not address plans maintained by churches.

B. The Agencies' Longstanding Interpretation Is Supported By The Context, History, And Purpose Of The MPPAA Amendments

The natural reading of Section 1002(33)(C)(i)'s text is reinforced by the "context," "history," and "purpose" of the MPPAA amendments. *Abramski* v. *United States*, 134 S. Ct. 2259, 2267 (2014) (citation omitted).

1. Under ERISA's original definition of "church plan," the employees of church agencies could be covered under an exempt plan only until 1982, and only if the plan also covered employees of the church. 29 U.S.C. 1002(33)(C) (1976). One central purpose of the MPPAA's church-plan amendments was to replace that temporary rule with a permanent provision allowing the employees of church agencies to be covered under exempt plans. See, *e.g.*, 126 Cong. Rec. 20,208 (July 29, 1980) (Joint Explanation of S. 1076, 96th Cong., 1st Sess. (1979)).

Both proponents and opponents of the MPPAA amendments recognized that the amended definition would exempt plans covering the employees of church agencies. Proponents advocated that result on the ground that "[c]hurch agencies are essential to the churches' mission" and "are, in fact, part of the churches." 125 Cong. Rec. 10,052 (May 7, 1979) (Sen. Talmadge). Opponents, including the Department of the Treasury, objected to the fact that the amendments would "exclude church agencies from the protection of ERISA." Exec. Sess. of the Senate Comm. on Finance, 96th Cong., 2d Sess. 41 (June 12, 1980) (*Executive Session*) (Daniel Halperin, Deputy Assistant Secretary, Dep't of Treasury); see 126 Cong. Rec. at 20,180 (Sen. Javits) ("As to the church pension plans, I might say that I am not too happy about [the

amendment] as it exempts those who work for schools and similar institutions which are church-related.").

2. The courts of appeals acknowledged that Congress sought to allow exempt church plans to cover the employees of church agencies, but concluded that Congress intended to exempt such plans only if they were initially established by a church. *Advocate* Pet. App. 18a-22a; *St. Peter's* Pet. App. 18a-22a; *Dignity* Pet. App. 11a-15a. That conclusion rests on a misunderstanding of another fundamental purpose of the MPPAA amendments: to make the church-plan exemption available on equal terms to the local churches and church agencies of decentralized congregational denominations.

One of the central criticisms of ERISA's original church-plan definition was that it failed to account for "the structural differences" between religious denominations and thereby disadvantaged "congregational denominations." 124 Cong. Rec. 12,107 (May 2, 1978) (Rep. Conable). In "hierarchical churches such as the Roman Catholic Church," there are "clear lines of responsibility, control and authority" through which the national church controls local churches and church agencies. *Senate Hearing* 399 (Gary Nash, Annuity Bd. of the Southern Baptist Convention). In congregational denominations, by contrast, "the national or regional bodies do not control the local congregations." *Id.* at 405 (John Ordway, Pension Bds. of the United Church of Christ); see 124 Cong. Rec. at 12,107 (Rep. Conable) ("In the congregational type of denomination, the local churches and agencies are self-governing.").

In a hierarchical denomination, the bodies administering benefit plans for the employees of churches and

church agencies could be integrated into the national church structure. *Senate Hearing* 405 (John Ordway, Pension Bds. of the United Church of Christ). Congregational denominations, however, typically relied on pension boards that were "separately incorporated from, but controlled by, the denomination." 125 Cong. Rec. at 10,052. Those separate boards administered pension and benefit plans for ministers and lay employees working in local churches and in church agencies, including hospitals, schools, and charities.[6]

After ERISA was enacted, congregational denominations argued to the IRS that plans administered by their pension boards satisfied the requirements of the original church-plan definition (at least so long as the temporary rule allowing coverage of church agencies remained in effect) because the pension boards themselves qualified as "churches" that could establish and maintain exempt church plans. See, *e.g.*, *Senate Hearing* 394 (Church Alliance); *id.* at 420 (Dean Wright, Ministers and Missionaries Bd. of the Am. Baptist Churches). But, as the Senate sponsor of the MPPAA's church-plan amendments explained, "there [wa]s a question whether" a plan administered by a pension board "is established by a church, as it must be, or by a pension board." 125 Cong. Rec. at 10,052 (Sen. Talmadge). The House sponsor of a predecessor bill made the same point, observing that "[i]t is not clear whether a plan administered by a pension board of a

---

[6] See, *e.g.*, *Senate Hearing* 376-377, 468-469 (Charles Cowsert, Bd. of Annuities and Relief, Presbyterian Church in the U.S.) (describing plans administered by a pension board for a congregational denomination); *id.* at 379 (Leo Landes, Retirement Bd. of United Synagogue of Am.) (same); *id.* at 413-417 (Dean Wright, Ministers and Missionaries Benefit Bd. of the Am. Baptist Churches) (same).

congregational church is a plan established and maintained for its employees by a church." 124 Cong. Rec. at 12,107 (Rep. Conable).

The sponsors emphasized that the MPPAA amendments resolved this uncertainty by making clear that "[a] plan or program funded or administered through a pension board * * * will be considered a church plan" if the board meets the requirements for a principal-purpose organization in Section 1002(33)(C)(i). 125 Cong. Rec. at 10,053 (Sen. Talmadge); see 124 Cong. Rec. at 12,107 (Rep. Conable) (same). Nothing in those statements indicated that a plan maintained by a pension board had to be "established" by a church to be exempt.

3. The lack of support for a church-establishment requirement in the legislative record is not surprising, because such a requirement would have excluded plans that Congress sought to treat as church plans. Some congregational denominations took the position that their plans were "established" by churches and merely "maintained" by pension boards, while recognizing that such boards might not be regarded as part of the church for purposes of the original exemption. *Senate Hearing* 461 (John Ordway, Pension Bds. of the United Church of Christ). But other denominations believed that their plans were both "*established and* maintained through church pension boards." *Id.* at 400-401 (Gary Nash, Annuity Bd. of the Southern Baptist Convention) (emphasis added); see Pet. Br. 35-36 (collecting additional examples). And even for denominations that could argue that their plans were "established" by churches and merely "maintained" by pension boards, a church-establishment requirement would have perpetuated the "question whether [such

a] plan is established by a church * * * or by a pension board"—an uncertainty the MPPAA amendments were designed to eliminate. 125 Cong. Rec. at 10,052 (Sen. Talmadge); see 124 Cong. Rec. at 12,107 (Rep. Conable).

Furthermore, Congress was aware that many plans administered by pension boards had been created long before ERISA was enacted. See 125 Cong. Rec. at 10,052 (Sen. Talmadge) ("The average age of a church plan is at least 40 years."); *Senate Hearing* 411 (Dean Wright, Ministers and Missionaries Benefit Bd. of the Am. Baptist Churches) ("Virtually all of these pension boards were established and in operation many years prior to the enactment of ERISA."). It is implausible to think that Congress intended the MPPAA's amended church-plan definition to turn on an uncertain inquiry into the identity of the organization that had "established" a plan decades earlier.

Preserving a church-establishment requirement would, moreover, have perpetuated problems that the MPPAA amendments were crafted to avoid. Such a requirement would have been more easily satisfied by hierarchical denominations than by their congregational counterparts, which lacked centralized governing bodies that could readily "establish" plans for the employees of church agencies. See 124 Cong. Rec. at 12,107 (Rep. Conable); *Senate Hearing* 399 (Gary Nash, Annuity Bd. of the Southern Baptist Convention); *Senate Hearing* 405 (John Ordway, Pension Bds. of the United Church of Christ). And a church-establishment requirement would have placed far greater significance on the question whether a particular religious entity qualified as a "church" entitled to establish an exempt plan, requiring inquiries like the

one reflected in the 1977 GCM. See IRS GCM 37,266, 1977 WL 46200, at *1-*2 (Sept. 22, 1977). The need for such inquiries had prompted criticism of ERISA's original definition, and supporters of the changes that were enacted by the MPPAA amendments emphasized that those changes would "eliminate[] the need to determine what organizations may be considered as parts of a church." *Senate Hearing* 458 (John Ordway, Pension Bds. of the United Church of Christ); see *id.* at 375, 463; *id.* at 471 (Charles Cowsert, Bd. of Annuities and Relief of the Presbyterian Church in the U.S.).

4. The drafting history of the MPPAA amendments confirms that a plan maintained by a principal-purpose organization under Section 1002(33)(C)(i) need not be established by a church. The language that became the MPPAA amendments was originally introduced in stand-alone bills in 1978 and 1979. See *Senate Hearing* 101 (quoting S. 1090, 96th Cong., 1st Sess. (1979)); 124 Cong. Rec. at 12,108 (quoting H.R. 12,172, 95th Cong., 2d Sess. (1978)). The initial draft of Section 1002(33)(C)(i) in those bills expressly contemplated that pension boards and other principal-purpose organizations would "establish" exempt plans. It provided that "[a] plan established and maintained by a church * * * shall include a plan *established* and maintained by [a principal-purpose organization]." *Senate Hearing* 102 (quoting S. 1090) (emphasis added); see 124 Cong. Rec. at 12,108 (quoting H.R. 12,172) (same).

As the Third and Seventh Circuits acknowledged, that original language made it "quite clear that church establishment of a plan would no longer be a prerequisite for the exemption." *St. Peter's* Pet. App. 15a; see

Advocate Pet. App. 20a. But those courts erroneously assumed that the sponsors reintroduced a church-establishment requirement in the version that was ultimately enacted into law. As relevant here, the final version reflected the following change from the initial proposal:

> A plan established and maintained * * * by a church * * * ~~shall~~ includes a plan ~~established and~~ maintained by [a principal-purpose organization].

29 U.S.C. 1002(33)(C)(i). That change actually *broadened* the exemption: Whereas the original language limited Section 1002(33)(C)(i) to plans that were both established *and* maintained by a principal-purpose organization, the final version encompassed any plan maintained by such an organization. Such a modification was necessary to achieve the MPPAA amendments' purpose, because the original draft would have excluded plans that were "established" by churches but then "maintained by a separate corporation" or pension board. *Senate Hearing* 461 (John Ordway, Pension Bds. of the United Church of Christ). It would thus be anomalous to treat that change in language as *narrowing* the exemption and re-imposing the church-establishment requirement that the original version of the amendments would have abolished.

C. The Agencies' Longstanding Interpretation Warrants Deference Under *Skidmore*

If there were any doubt about the best reading of the church-plan exemption, it would be resolved by the longstanding interpretation applied by the IRS, DOL, and PBGC, the expert agencies charged by Congress with administering ERISA's complex statu-

tory scheme. That construction should carry particular weight because Congress has repeatedly revisited the treatment of church plans under ERISA and related statutes without disturbing the agencies' interpretation.

1. Congress assigned responsibility for administering and enforcing the relevant provisions of ERISA to the IRS, DOL, and PBGC. 26 U.S.C. 7801(a); 29 U.S.C. 1132-1135, 1302(b)(3). For more than three decades, those agencies have consistently concluded that a plan maintained by a principal-purpose organization described in Section 1002(33)(C)(i) need not be established by a church to qualify as a church plan. See, *e.g.*, DOL Advisory Op. No. 2000-05A, 2000 WL 744359, at *1 (May 17, 2000); IRS GCM 39,793, 1989 WL 592761, at *5-*7 (July 6, 1989); IRS GCM 39,007, 1983 WL 197946, at *4-*5 (Nov. 2, 1982). That interpretation is reflected in hundreds of private letter rulings and opinion letters confirming the exempt status of particular plans. *Advocate* Pet. App. 64a-111a (citing 568 examples).

Although the agencies' interpretation is not embodied in notice-and-comment regulations, the agencies' implementation of the statute "constitute[s] a body of experience and informed judgment" that, under the circumstances present here, should be accorded considerable deference. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Under *Skidmore*, the weight due to such an administrative construction "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Ibid.*

The agencies' interpretation of the church-plan exemption originated in the IRS's 1982 GCM, which recognized that "because of the passage of the MPPA[A]" two years earlier, "church plan status no longer hinges on whether [a religious] order is a church." 1982 GCM at *6. The IRS explained that the absence of a church-establishment requirement followed from the text of the amended statute, which had superseded the IRS's own prior approach reflected in the 1977 GCM. *Id.* at *4-*6. Deference to an agency's interpretation is "[p]articularly" appropriate where, as here, "the administrative practice at stake involves a contemporaneous construction of a statute." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (quoting *Power Reactor Dev. Co.* v. *International Union of Elec.*, 367 U.S. 396, 408 (1961)).

The agencies have, moreover, consistently adhered to that construction for more than three decades. This Court "normally accord[s] particular deference to an agency interpretation of 'longstanding' duration," *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 487 (2004) (*ADEC*) (quoting *Barnhart* v. *Walton*, 535 U.S. 212, 220 (2002)), and to agency positions applied "with consistency," *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008). And there are particularly strong reasons not to disturb a long-settled administrative interpretation where, as here, it has generated "substantial reliance" by parties who have structured their affairs based on a position consistently and frequently reaffirmed by the responsible agencies. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457 (1978).

Deference is also appropriate "where [a] regulatory scheme is highly detailed." *United States* v. *Mead*

Corp., 533 U.S. 218, 235 (2001). That principle applies with special force to ERISA, "an enormously complex and detailed statute." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 262 (1993). This Court has thus traditionally deferred to the IRS, DOL, and PBGC when interpreting ERISA because "to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to embark upon a voyage without a compass." *Mead Corp.* v. *Tilley*, 490 U.S. 714, 726 (1989) (brackets and citation omitted); see *Beck* v. *Pace Int'l Union*, 551 U.S. 96, 104 (2007) (same). And the Court has extended such deference even where, as here, the relevant administrative interpretation was reflected in opinion letters rather than notice-and-comment regulations. See, *e.g.*, *Raymond B. Yates, M.D., P.C. Profit Sharing Plan* v. *Hendon*, 541 U.S. 1, 17-18 (2004) (DOL advisory opinion); *Mead*, 490 U.S. at 722-725 (PBGC opinion letters).

2. Congress's subsequent treatment of church plans confirms that the Court should not "reject as impermissible [the agencies'] longstanding, consistently maintained interpretation." *ADEC*, 540 U.S. at 488. In the decades since enacting the MPPAA, Congress has repeatedly revisited the legal status of church plans to refine their treatment under ERISA, the Internal Revenue Code, and related laws. In 2015, for example, Congress enacted a detailed provision modifying the application of a variety of tax provisions to church plans. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 336, 129 Stat. 3109-3113. Congress has also preempted the application of certain state laws to church plans. See *id.* § 336(c), 129 Stat. 3111; see also Act of July 10, 2000, Pub. L. No.

106-244, 114 Stat. 499 (enacting 29 U.S.C. 1144a). And Congress has incorporated the MPPAA definition into a variety of other statutes affording exemptions or special treatment to church plans.[7]

The fact that Congress has repeatedly refined the legal treatment of church plans and extended the church-plan exemption to other contexts without disturbing the agencies' longstanding interpretation further confirms that the agencies' interpretation is correct. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the inter-

---

[7] See, *e.g.*, Social Security Protection Act of 2004, Pub. L. No. 108-203, § 422, 118 Stat. 536 (amending 42 U.S.C. 411(a)(7) to exempt certain benefits paid by church plans); Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 659, 115 Stat. 139 (enacting 26 U.S.C. 4980F(f)(2), which excludes defined-benefit church plans from the requirement to notify participants of benefit accrual reductions in advance); Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1532, 111 Stat. 1085 (adopting 26 U.S.C. 9802(c) (now codified as 26 U.S.C. 9802(f)), which partially exempts church plans from a prohibition against discrimination based on health status); National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 508, 110 Stat. 3447-3449 (enacting various provisions exempting church plans from securities laws); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 402, 110 Stat. 2084-2085 (enacting 26 U.S.C. 4980D(b)(3)(C), which exempts church plans from an excise tax imposed on health plans that do not meet certain requirements); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 10001(b), 100 Stat. 223 (exempting church plans from a tax provision related to continuation health coverage).

pretation is the one intended by Congress.'" *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) (citation omitted); see, *e.g.*, *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-828 (2013).

In 2004, moreover, Congress enacted a statute premised on the understanding that a church plan need not be established by a church. The statute addressed the pension plan of the Young Men's Christian Association (YMCA). That plan had not been established by a church, but the IRS—relying on the agencies' longstanding interpretation—had concluded that the plan was "in full compliance" with the church-plan exemption, with the "possible exception" that the YMCA was not "affiliated with any one church." 149 Cong. Rec. 7380 (Mar. 25, 2003) (Sen. Bunning); see 150 Cong. Rec. 24,328-24,331 (Nov. 19, 2004) (similar).

To resolve that uncertainty about the YMCA plan's status, Congress enacted a statute providing that, for specified purposes, the plan "shall be treated as a church plan (within the meaning of section 414(e) of [the Internal Revenue] Code) *which is maintained by an organization described in section 414(e)(3)(A) of such Code*." Act of Dec. 21, 2004, Pub. L. No. 108-476, § 1(a), 118 Stat. 3901 (emphasis added). That provision reflects congressional ratification of the agencies' view that a plan need not be established by a church to qualify for church-plan treatment. And the specific reference to 26 U.S.C. 414(e)(3)(A)—the Internal Revenue Code counterpart to Section 1002(33)(C)(i)—shows that Congress understood that being "maintained" by a principal-purpose organization described in those provisions is sufficient to confer church-plan status.

D. There Is No Sound Reason To Reject The Agencies' Longstanding Interpretation And Impose A Church-Establishment Requirement

The courts of appeals identified no sound reason to upset decades of reliance on the agencies' longstanding interpretation by imposing a church-establishment requirement.

1. The courts of appeals appeared to believe that requiring a church to "establish" a church plan would ensure that the church retained control of or financial responsibility for the plan. See, *e.g.*, *Advocate* Pet. App. 17a-18a. Even if that were correct, the courts' apparent view that an ERISA exemption should be conditioned on continuing church involvement would not justify the imposition of a requirement that Congress omitted from the statute. And in any event, requiring a church to establish a plan in the first instance would not guarantee such an ongoing role.

The question whether an employer or other entity "established" an ERISA plan typically arises when there is a dispute about whether a benefit plan triggering ERISA obligations exists at all. In that context, the courts of appeals have concluded that the establishment of a plan does not require a formal written document and instead turns on a practical inquiry into the surrounding circumstances. The leading decision held that an ERISA plan is "established" if "a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *Donovan* v. *Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc); see *Williams* v. *WCI Steel Co.*, 170 F.3d 598, 603 n.3 (6th Cir. 1999).

By analogy, requiring a church to "establish" an ERISA-exempt plan for the employees of a church agency would require the church to play some role in the plan's creation. But even for plans subject to ERISA, the employer or other entity that establishes a plan in the first instance does not necessarily retain ongoing responsibility. ERISA defines the "sponsor" responsible for a plan as the employer or other entity that "establishe[s] *or maintain*[*s*]" the plan. 29 U.S.C. 1002(16)(B) (emphasis added). And it is not uncommon for an ERISA plan to be initially established by one entity and later transferred to a different entity, which assumes responsibility for maintaining it. See, *e.g.*, 29 U.S.C. 1058 (regulating plan mergers and transfers); see also 26 U.S.C. 414(*l*) (same). In such circumstances, the entity that established the plan need not retain any continuing financial liability or other involvement.

Limiting the church-plan exemption to plans initially "established" by churches thus would not guarantee that the churches would play an ongoing role in the exempt plans. To the contrary, Section 1002(33)(C)(i) expressly contemplates that the principal-purpose organization that "maintain[s]" such a plan may have responsibility for the plan's "administration" and "funding." 29 U.S.C. 1002(33)(C)(i). The courts of appeals identified no reason why Congress would have wanted to condition an exemption for plans funded and controlled by church-affiliated principal-purpose organizations on a requirement that those plans be "established" in the first instance by churches. To the contrary, as the Second Circuit observed in a different context, "the status of the entity which currently maintains a particular pension plan bears more rela-

tion to Congress' goals in enacting ERISA and its various exemptions, than does the status of the entity which established the plan." *Rose* v. *Long Island R.R. Pension Plan*, 828 F.2d 910, 920 (1987), cert. denied, 485 U.S. 936 (1988).

2. Respondents have also argued that Congress would not have intended to exclude the employees of large healthcare providers like petitioners from ERISA. But the MPPAA amendments unambiguously allow the employees of any tax-exempt organization "controlled by or associated with a church" to be covered under an exempt church plan; indeed, Congress expressly deemed such employees to be "employee[s] of a church." 29 U.S.C. 1002(33)(C)(ii)(II). It was understood at the time that those amendments would allow the exemption of plans covering the employees of church agencies, including "hospital[s]." *Executive Session* 41 (Daniel Halperin, Deputy Assistant Secretary, Dep't of Treasury); see, *e.g.*, 126 Cong. Rec. at 20,208 (Joint Explanation of S. 1076); 125 Cong. Reg. at 10,052 (Sen. Talmadge).

There is thus no dispute that the employees of a church-affiliated hospital that otherwise satisfies the statutory requirements can be covered under an ERISA-exempt church plan. Indeed, the Third Circuit emphasized that its interpretation "by no means eliminated" the "ability of church agencies to have their employees covered by exempt plans." *St. Peter's* Pet. App. 25a. Instead, the only question is the mechanism by which that result may be achieved. As the administering agencies have long concluded—and as the statutory text, context, history, and purpose confirm—Congress did not condition the church-plan

exemption on a church establishing the plan in the first instance.[8]

---

[8] Respondents have argued that the canon of constitutional avoidance supports their position because exempting petitioners' plans from ERISA would violate the Establishment Clause. *Advocate* Br. in Opp. 34-35; *St. Peter's* Br. in Opp. 26-27; *Dignity* Br. in Opp. 34-35. The courts of appeals correctly declined to rely on the avoidance canon. In other circumstances, this Court has recognized that Congress may, consistent with the Establishment Clause, respect religious autonomy and avoid entanglement with religion by exempting religious nonprofit organizations from generally applicable employment regulations. See *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 338 (1987); cf. *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 501-507 (1979). In addition, the church-establishment requirement that respondents seek to impose would not cure the purported constitutional defect they identify because it would not narrow the range of employees who could potentially be covered under ERISA-exempt plans—instead, it would merely condition that exemption on the additional procedural step of church establishment.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

ROBERT J. NEIS
Benefits Tax Counsel
Department of the Treasury

DEBRA K. MOE
Deputy Chief Counsel (Operations)
Internal Revenue Service

KATHERINE E. BISSELL
Deputy Solicitor for Regional Enforcement
Department of Labor

JUDITH R. STARR
General Counsel
Pension Benefit Guaranty Corporation

EDWIN S. KNEEDLER
Deputy Solicitor General[*]
JOYCE R. BRANDA
Acting Assistant Attorney General
BRIAN H. FLETCHER
Assistant to the Solicitor General
MARK B. STERN
ALISA B. KLEIN
NICOLAS Y. RILEY
Attorneys

JANUARY 2017

---

[*] The Acting Solicitor General is recused in this case.

APPENDIX

1. 26 U.S.C. 414(e) provides:

Definitions and special rules

(e) Church plan

(1) In general

For purposes of this part, the term "church plan" means a plan established and maintained (to the extent required in paragraph (2)(B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501.

(2) Certain plans excluded

The term "church plan" does not include a plan—

(A) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513); or

(B) if less than substantially all of the individuals included in the plan are individuals described in paragraph (1) or (3)(B) (or their beneficiaries).

(3) Definitions and other provisions

For purposes of this subsection—

(A) Treatment as church plan

A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

(B) Employee defined

The term employee of a church or a convention or association of churches shall include—

(i) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(ii) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 and which is controlled by or associated with a church or a convention or association of churches; and

(iii) an individual described in subparagraph (E).

(C) Church treated as employer

A church or a convention or association of churches which is exempt from tax under section

501 shall be deemed the employer of any individual included as an employee under subparagraph (B).

(D) Association with church

An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

(E) Special rule in case of separation from plan

If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization described in clause (ii) of paragraph (3)(B), the church plan shall not fail to meet the requirements of this subsection merely because the plan—

(i) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or

(ii) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section 72(m)(7)) at the time of such separation from service.

(4) Correction of failure to meet church plan requirements

(A) In general

If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 fails to meet one or more of the requirements of this subsection and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this subsection for the year in which the correction was made and for all prior years.

(B) Failure to correct

If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this subsection beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

(C) Correction period defined

The term "correction period" means—

(i) the period, ending 270 days after the date of mailing by the Secretary of a notice of default with respect to the plan's failure to meet one or more of the requirements of this subsection;

(ii) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secre-

tary on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or

(iii) any additional period which the Secretary determines is reasonable or necessary for the correction of the default,

whichever has the latest ending date.

(5) Special rules for chaplains and self-employed ministers

(A) Certain ministers may participate

For purposes of this part—

(i) In general

A duly ordained, commissioned, or licensed minister of a church is described in paragraph (3)(B) if, in connection with the exercise of their ministry, the minister—

(I) is a self-employed individual (within the meaning of section 401(c)(1)(B), or

(II) is employed by an organization other than an organization which is described in section 501(c)(3) and with respect to which the minister shares common religious bonds.

(ii) Treatment as employer and employee

For purposes of sections 403(b)(1)(A) and 404(a)(10), a minister described in clause (i)(I) shall be treated as employed by the minister's own employer which is an organization de-

scribed in section 501(c)(3) and exempt from tax under section 501(a).

(B) Special rules for applying section 403(b) to self-employed ministers

In the case of a minister described in subparagraph (A)(i)(I)—

(i) the minister's includible compensation under section 403(b)(3) shall be determined by reference to the minister's earned income (within the meaning of section 401(c)(2)) from such ministry rather than the amount of compensation which is received from an employer, and

(ii) the years (and portions of years) in which such minister was a self-employed individual (within the meaning of section 401(c)(1)(B)) with respect to such ministry shall be included for purposes of section 403(b)(4).

(C) Effect on non-denominational plans

If a duly ordained, commissioned, or licensed minister of a church in the exercise of his or her ministry participates in a church plan (within the meaning of this section) and in the exercise of such ministry is employed by an employer not otherwise participating in such church plan, then such employer may exclude such minister from being treated as an employee of such employer for purposes of applying sections 401(a)(3), 401(a)(4), and 401(a)(5), as in effect on September 1, 1974, and sections 401(a)(4), 401(a)(5), 401(a)(26), 401(k)(3), 401(m), 403(b)(1)(D) (in-

cluding section 403(b)(12)), and 410 to any stock bonus, pension, profit-sharing, or annuity plan (including an annuity described in section 403(b) or a retirement income account described in section 403(b)(9)). The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purpose of, and prevent the abuse of, this subparagraph.

(D) Compensation taken into account only once

If any compensation is taken into account in determining the amount of any contributions made to, or benefits to be provided under, any church plan, such compensation shall not also be taken into account in determining the amount of any contributions made to, or benefits to be provided under, any other stock bonus, pension, profit-sharing, or annuity plan which is not a church plan.

(E) Exclusion

In the case of a contribution to a church plan made on behalf of a minister described in subparagraph (A)(i)(II), such contribution shall not be included in the gross income of the minister to the extent that such contribution would not be so included if the minister was an employee of a church.

2. 29 U.S.C. 1002 provides in pertinent part:

Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. A distribution from a plan, fund, or program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

* * * * *

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * * * *

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

* * * * *

(16)(A) The term "administrator" means—

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

* * * * *

(33)(A) The term "church plan" means a plan established and maintained (to the extent required in clause (ii) of subparagraph (B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of title 26.

(B) The term "church plan" does not include a plan—

(i) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with

one or more unrelated trades or businesses (within the meaning of section 513 of title 26), or

(ii) if less than substantially all of the individuals included in the plan are individuals described in subparagraph (A) or in clause (ii) of subparagraph (C) (or their beneficiaries).

(C) For purposes of this paragraph—

(i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

(ii) The term employee of a church or a convention or association of churches includes—

(I) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of title 26 and which is controlled by or associated with a church or a convention or association of churches; and

(III) an individual described in clause (v).

(iii) A church or a convention or association of churches which is exempt from tax under section 501 of title 26 shall be deemed the employer of any individual included as an employee under clause (ii).

(iv) An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

(v) If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of title 26 and which is controlled by or associated with a church or a convention or association of churches, the church plan shall not fail to meet the requirements of this paragraph merely because the plan—

(I) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or

(II) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section 72(m)(7) of title 26) at the time of such separation from service.

(D)(i) If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of title 26 fails to meet one or more of the requirements of this paragraph and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this paragraph for the year in which the correction was made and for all prior years.

(ii) If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this paragraph beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

(iii) For purposes of this subparagraph, the term "correction period" means—

(I) the period ending 270 days after the date of mailing by the Secretary of the Treasury of a notice of default with respect to the plan's failure to meet one or more of the requirements of this paragraph; or

(II) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secretary of the Treasury on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or

(III) any additional period which the Secretary of the Treasury determines is reasonable or necessary for the correction of the default,

whichever has the latest ending date.

* * * * *

3. 26 U.S.C. 414(e) (1976) provides:

Definitions and special rules

(e) Church plan

(1) In general

For purposes of this part the term "church plan" means—

(A) a plan established and maintained for its employees by a church or by a convention or association of churches which is exempt from tax under section 501, or

(B) a plan described in paragraph (3).

(2) Certain unrelated business or multiemployer plans

The term "church plan" does not include a plan—

(A) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513), or

(B) which is a plan maintained by more than one employer, if one or more of the employers in

the plan is not a church (or a convention or association of churches) which is exempt from tax under section 501.

(3) **Special temporary rule for certain church agencies under church plan**

(A) Notwithstanding the provisions of paragraph (2)(B), a plan in existence on January 1, 1974, shall be treated as a church plan if it is established and maintained by a church or convention or association of churches and one or more agencies of such church (or convention or association) for the employees of such church (or convention or association) and the employees of one or more agencies of such church (or convention or association), and if such church (or convention or association) and each such agency is exempt from tax under section 501.

(B) Subparagraph (A) shall not apply to any plan maintained for employees of an agency with respect to which the plan was not maintained on January 1, 1974.

(C) Subparagraph (A) shall not apply with respect to any plan for any plan year beginning after December 31, 1982.

4. 29 U.S.C. 1002(33) (1976) provides:

Definitions

(33)(A) The term "church plan" means (i) a plan established and maintained for its employees by a church or by a convention or association of churches

which is exempt from tax under section 501 of title 26, or (ii) a plan described in subparagraph (C).

(B) The term "church plan" (notwithstanding the provisions of subparagraph (A)) does not include a plan—

(i) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513 of title 26), or

(ii) which is a plan maintained by more than one employer, if one or more of the employers in the plan is not a church (or a convention or association of churches) which is exempt from tax under section 501 of title 26.

(C) Notwithstanding the provisions of subparagraph (B)(ii), a plan in existence on January 1, 1974, shall be treated as a "church plan" if it is established and maintained by a church or convention or association of churches for its employees and employees of one or more agencies of such church (or convention or association) for the employees of such church (or convention or association) and the employees of one or more agencies of such church (or convention or association), and if such church (or convention or association) and each such agency is exempt from tax under section 501 of title 26. The first sentence of this subparagraph shall not apply to any plan maintained for employees of an agency with respect to which the plan was not maintained on January 1, 1974. The first sentence of

this subparagraph shall not apply with respect to any plan for any plan year beginning December 31, 1982.

5. Pub. L. No. 108-476, 118 Stat. 3901 provides:

SECTION 1. CERTAIN ARRANGEMENTS MAINTAINED BY THE YMCA RETIREMENT FUND TREATED AS CHURCH PLANS.

(a) RETIREMENT PLANS.—

(1) IN GENERAL.—For purposes of sections 401(a) and 403(b) of the Internal Revenue Code of 1986, any retirement plan maintained by the YMCA Retirement Fund as of January 1, 2003, shall be treated as a church plan (within the meaning of section 414(e) of such Code) which is maintained by an organization described in section 414(e)(3)(A) of such Code.

(2) TAX-DEFERRED RETIREMENT PLAN.—In the case of a retirement plan described in paragraph (1) which allows contributions to be made under a salary reduction agreement—

(A) such treatment shall not apply for purposes of section 415(c)(7) of such Code, and

(B) any account maintained for a participant or beneficiary of such plan shall be treated for purposes of such Code as a retirement income account described in section 403(b)(9) of such Code, except that such account shall not, for purposes of section 403(b)(12) of such Code, be treated as a contract purchased by a church for purposes of section 403(b)(1)(D) of such Code.

(3) MONEY PURCHASE PENSION PLAN.—In the case of a retirement plan described in paragraph (1) which is subject to the requirements of section 401(a) of such Code—

(A) such plan (but not any reserves held by the YMCA Retirement Fund)—

(i) shall be treated for purposes of such Code as a defined contribution plan which is a money purchase pension plan, and

(ii) shall be treated as having made an election under section 410(d) of such Code for plan years beginning after December 31, 2005, except that notwithstanding the election—

(I) nothing in the Employee Retirement Income Security Act of 1974 or such Code shall prohibit the YMCA Retirement Fund from commingling for investment purposes the assets of the electing plan with the assets of such Fund and with the assets of any employee benefit plan maintained by such Fund, and

(II) nothing in this section shall be construed as subjecting any assets described in subclause (I), other than the assets of the electing plan, to any provision of such Act,

(B) notwithstanding section 401(a)(11) or 417 of such Code or section 205 of such Act, such plan may offer a lump-sum distribution option to participants who have not attained age 55 without offering such participants an annuity option, and

(C) any account maintained for a participant or beneficiary of such plan shall, for purposes of section 401(a)(9) of such Code, be treated as a retirement income account described in section 403(b)(9) of such Code.

(4) SELF-FUNDED DEATH BENEFIT PLAN.—For purposes of section 7702(j) of such Code, a retirement plan described in paragraph (1) shall be treated as an arrangement described in section 7702(j)(2).

(b) YMCA RETIREMENT FUND.—For purposes of this section, the term "YMCA Retirement Fund" means the Young Men's Christian Association Retirement Fund, a corporation created by an Act of the State of New York which became law on April 30, 1921.

(c) EFFECTIVE DATE.—This section shall apply to plan years beginning after December 31, 2003.

6. 26 C.F.R. 1.414(e)-1 provides:

Definition of church plan.

(a) *General rule.* For the purposes of part I of subchapter D of chapter 1 of the Code and the regulations thereunder, the term "church plan" means a plan established and at all times maintained for its employees by a church or by a convention or association of churches (hereinafter included within the term "church") which is exempt from tax under section 501(a), provided that such plan meets the requirements of paragraphs (b) and (if applicable) (c) of this section. If at any time during its existence a plan is not a church plan because of a failure to meet the requirements set

forth in this section, it cannot thereafter become a church plan.

(b) *Unrelated businesses*—(1) *In general.* A plan is not a church plan unless it is established and maintained primarily for the benefit of employees (or their beneficiaries) who are not employed in connection with one or more unrelated trades or businesses (within the meaning of section 513).

(2) *Establishment or maintenance of a plan primarily for persons not employed in connection with one or more unrelated trades or businesses.* (i) (A) A plan, other than a plan in existence on September 2, 1974, is established primarily for the benefit of employees (or their beneficiaries) who are not employed in connection with one or more unrelated trades or businesses if on the date the plan is established the number of employees employed in connection with the unrelated trades or businesses eligible to participate in the plan is less than 50 percent of the total number of employees of the church eligible to participate in the plan.

(B) A plan in existence on September 2, 1974, is to be considered established as a plan primarily for the benefit of employees (or their beneficiaries) who are not employed in connection with one or more unrelated trades or businesses if it meets the requirements of both paragraphs (b)(2)(ii) (A) and (B) (if applicable) in either of its first 2 plan years ending after September 2, 1974.

(ii) For plan years ending after September 2, 1974, a plan will be considered maintained primarily for the benefit of employees of a church who are not employed

in connection with one or more unrelated trades or businesses if in 4 out of 5 of its most recently completed plan years—

(A) Less than 50 percent of the persons participating in the plan (at any time during the plan year) consist of and in the same year

(B) Less than 50 percent of the total compensation paid by the employer during the plan year (if benefits or contributions are a function of compensation) to employees participating in the plan is paid to, employees employed in connection with an unrelated trade or business. The determination that the plan is not a church plan will apply to the second year (within a 5 year period) for which the plan fails to meet paragraph (b)(2)(ii) (A) or (B) (if applicable) and to all plan years thereafter unless, taking into consideration all of the facts and circumstances as described in paragraph (b)(2)(iii) of this section, the plan is still considered to be a church plan. A plan that has not completed 5 plan years ending after September 2, 1974, shall be considered maintained primarily for the benefit of employees not employed in connection with an unrelated trade or business unless it fails to meet paragraphs (b)(2)(ii) (A) and (B) in at least 2 such plan years.

(iii) Even though a plan does not meet the provisions of paragraph (b)(2)(ii) of this section, it nonetheless will be considered maintained primarily for the benefit of employees who are not employed in connection with one or more unrelated trades or businesses if the church maintaining the plan can demonstrate that based on all of the facts and circumstances such is the case. Among the facts and circumstances to be considered in evaluating each case are:

(A) The margin by which the plan fails to meet the provisions of paragraph (b)(2)(ii) of this section, and

(B) Whether the failure to meet such provisions was due to a reasonable mistake as to what constituted an unrelated trade or business or whether a particular person or group of persons were employed in connection with one or more unrelated trades or businesses.

(iv) For purposes of this section, an employee will be considered eligible to participate in a plan if such employee is a participant in the plan or could be a participant in the plan upon making mandatory employee contributions to the plan.

(3) *Employment in connection with one or more unrelated trades or businesses.* An employee is employed in connection with one or more unrelated trades or businesses of a church if a majority of such employee's duties and responsibilities in the employ of the church are directly or indirectly related to the carrying on of such trades or businesses. Although an employee's duties and responsibilities may be insignificant with respect to any one unrelated trade or business, such employee will nonetheless be considered as employed in connection with one or more unrelated trades or businesses if such employee's duties and responsibilities with respect to all of the unrelated trades or businesses of the church represent a majority of the total of such person's duties and responsibilities in the employ of the church.

(c) *Plans of two or more employers.* The term "church plan" does not include a plan which, during the plan year, is maintained by two or more employers unless—

(1) Each of the employers is a church that is exempt from tax under section 501(a), and

(2) With respect to the employees of each employer, the plan meets the provisions of paragraph (b)(2)(ii) of this section or would be determined to be a church plan based on all the facts and circumstances described in paragraph (b)(2)(iii) of this section.

Thus, if with respect to a single employer the plan fails to meet any provision of this paragraph, the entire plan ceases to be a church plan unless that employer ceases maintaining the plan for all plan years beginning after the plan year in which it receives a final notification from the Internal Revenue Service that it does not meet the provisions of this paragraph. If the employer does cease maintaining the plan in accordance with this paragraph, the fact that the employer formerly did maintain the plan will not prevent the plan from being a church plan for prior years.

(d) *Special rule.* (1) Notwithstanding paragraph (c)(1) of this section, a plan maintained by a church and one or more agencies of such church for the employees of such church and of such agency or agencies, that is in existence on January 1, 1974, shall be treated as a church plan for plan years ending after September 2, 1974, and beginning before January 1, 1983, provided that the plan is described in paragraph (c) of this section without regard to paragraph (c)(1) of this section, and the plan is not maintained by an agency which did not maintain the plan on January 1, 1974.

(2) For the purposes of section 414(e) and this section, an agency of a church means an organization which is exempt from tax under section 501 and which

is either controlled by, or associated with, a church. For example, an organization, a majority of whose officers or directors are appointed by a church's governing board or by officials of a church, is controlled by a church within the meaning of this paragraph. An organization is associated with a church if it shares common religious bonds and convictions with that church.

(e) *Religious orders and religious organizations.* For the purpose of this section the term "church" includes a religious order or a religious organization if such order or organization (1) is an integral part of a church, and (2) is engaged in carrying out the functions of a church, whether as a civil law corporation or otherwise.

(f) *Separately incorporated fiduciaries.* A plan which otherwise meets the provisions of this section shall not lose its status as a church plan because of the fact that it is administered by a separately incorporated fiduciary such as a pension board or a bank.

(g) *Cross reference.* (1) For rules relating to treatment of church plans, see section 410(c), 411(e), 412(h), 4975(g), and the regulations thereunder.

(2) For rules relating to church plan elections, see section 410(d) and the regulations thereunder.

RECORD AND BRIEFS.

FILED
FEB 23 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 16-74, 16-86, 16-258

In the Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, *et al.*, *Petitioners*,
v.
MARIA STAPLETON, *et al.*, *Respondents*.

SAINT PETER'S HEALTHCARE SYSTEM, *et al.*, *Petitioners*,
v.
LAURENCE KAPLAN, *Respondent*.

DIGNITY HEALTH, *et al.*, *Petitioners*,
v.
STARLA ROLLINS, *Respondent*.

On Writs of Certiorari to the United States Courts of Appeals for the Third, Seventh, and Ninth Circuits

BRIEF OF AARP AND AARP FOUNDATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

WILLIAM ALVARADO RIVERA
MARY ELLEN SIGNORILLE*
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
Tel: (202) 434-2072
warivera@aarp.org
msignorille@aarp.org
Counsel for Amici Curiae
AARP and AARP Foundation
Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. PETITIONERS ARE BUSINESSES, NOT CHURCHES, AND THUS ARE NOT ENTITLED TO TAKE ADVANTAGE OF ERISA'S CHURCH PLAN EXEMPTION 7

II. CONGRESS ENACTED ERISA IN RESPONSE TO BROKEN PENSION PROMISES TO ENSURE THAT EMPLOYEES RECEIVE THEIR PENSIONS 13

A. Employers Promise Pensions to Employees As Deferred Compensation 13

B. Congress Enacted ERISA In Response To Broken Pension Promises 14

C. Because Congress Intended That ERISA Cover The Majority Of Employee Benefit Plans To Ensure That Employees Receive Their Pensions, The Church Plan Exemption Should Be Narrowly Construed 17

III. BROAD APPLICATION OF THE CHURCH PLAN EXEMPTION WOULD DEPRIVE EMPLOYEES OF SAFEGUARDS THAT CONGRESS ENACTED TO PROTECT EMPLOYEE PENSIONS 19

A. Broad Application Of The Church Plan Exemption Would Deprive Employees Of ERISA's Minimum Plan Funding Protections And Insurance Guarantees 20

B. Broad Application Of The Church Plan Exemption Would Deprive Employees Of ERISA's Guarantee Of Pension Vesting 24

C. Broad Application Of The Church Plan Exemption Would Deprive Employees Of ERISA's Protection From Reductions To, Or Elimination Of, Their Pension Benefits 26

D. Broad Application Of The Church Plan Exemption Would Deprive Employees Of ERISA's Fiduciary Protections Against Self-dealing, Mismanagement, And Abuses 28

E. Broad Application Of The Church Plan Exemption Would Deprive Employees Of ERISA's Disclosure Scheme 31

F. Broad Application Of The Church Plan Exemption Would Deprive Employees Of ERISA's Protections For Benefit Distributions 33

G. Broad Application Of The Church Plan Exemption Would Deprive Employees Of ERISA's Protections For Benefit Claims Disputes 34

CONCLUSION 35

TABLE OF AUTHORITIES

Cases

A. H. Phillips, Inc. v. Walling,
324 U.S. 490 (1945) 18

Alessi v. Raybestos-Manhattan, Inc.,
451 U.S. 504 (1981) 6, 25

Amato v. Western Union Int'l, Inc.,
773 F.2d 1402 (2d Cir. 1985) 27

Andrus v. Glover Constr. Co.,
446 U.S. 608 (1980) 17

A-T-O-Inc. v. Pension Benefit Guar. Corp.,
634 F.2d 1013 (6th Cir. 1980) 20

Boggs v. Boggs,
520 U.S. 833 (1997) 33

Cent. Laborers' Pension Fund v. Heinz,
541 U.S. 739 (2004) 5, 26, 28

CIGNA Corp. v. Amara,
563 U.S. 421 (2011) 1

Comm'r of Internal Revenue v. Keystone Consol. Indus., Inc., 508 U.S. 152 (1993) 30

Grossmuller v. Int'l Union, UAW,
715 F.2d 853 (3d Cir. 1983) 34

Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990) 18

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 13

John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank, 510 U.S. 86 (1993) 18

Kaplan v. St. Peter's Healthcare Sys., 810 F.3d 175 (3d Cir. 2015) 1, 19, 22

LaRue v. DeWolff, Boberg & Assocs., 552 U.S. 248 (2008) 1

Lockheed Corp. v. Spink, 517 U.S. 882 (1999) 13, 26

Malone v. White Motor Corp., 435 U.S. 497 (1978) 14

McDonald v. Pension Plan of NYSA-ILA Pension Tr. Fund, 320 F.3d 151 (2d Cir. 2003) 27

Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Ben. Plan, 136 S. Ct. 651 (2016) 1

Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359 (1980) ..... *passim*

Rodriguez v. Compass Shipping Co., 451 U.S. 596 (1981) 17

Rollins v. Dignity Health,
830 F.3d 900 (9th Cir. 2016) 1

Stapleton v. Advocate Health Care Network,
817 F.3d 517 (7th Cir. 2016) 1, 18, 19

Statutes, Rules and Regulations

Employee Retirement Income Security Act (2012),
29 U.S.C. §§ 1001-1461 2
29 U.S.C. § 1001 ..... 31, 32
29 U.S.C. § 1001(a) ..... *passim*
29 U.S.C. § 1001(b) 2, 19, 29
29 U.S.C. § 1002(14)(c) 30
29 U.S.C. § 1002(19) 26
29 U.S.C. § 1002(23)(A) 26
29 U.S.C. § 1003(b) 17, 22
29 U.S.C. § 1003(b)(2) 4
29 U.S.C. § 1021 32
29 U.S.C. §§ 1021-1022 32
29 U.S.C. §§ 1021-30 6
29 U.S.C. § 1022(b) 32
29 U.S.C. § 1023-24 32
29 U.S.C. § 1024 32
29 U.S.C. § 1024(b)(4) 32
29 U.S.C. § 1052 6
29 U.S.C. § 1053 ..... 6, 25, 26
29 U.S.C. § 1054 ..... 6, 26
29 U.S.C. § 1054(a) 27
29 U.S.C. § 1054(b)(1) 27
29 U.S.C. § 1054(b)(1)(H) 27
29 U.S.C. § 1054(g) 28
29 U.S.C. § 1054(h) 32
29 U.S.C. § 1055 6

29 U.S.C. § 1055(a) 33
29 U.S.C. § 1055(c)(2) 33
29 U.S.C. § 1056 6
29 U.S.C. § 1056(d) 33
29 U.S.C. §§ 1081-1085 6
29 U.S.C. § 1082 21
29 U.S.C. § 1083 21
29 U.S.C. §§ 1101-1114 6
29 U.S.C. § 1103 29
29 U.S.C. § 1104(a)(1) 29
29 U.S.C. § 1104(a)(1)(A) 29
29 U.S.C. § 1104(a)(1)(B) 29
29 U.S.C. § 1104(a)(1)(C) 29
29 U.S.C. § 1104(a)(1)(D) 30
29 U.S.C. § 1106 30
29 U.S.C. § 1106(a)(1) 30
29 U.S.C. § 1133 ..... 6, 34
29 U.S.C. § 1302 21
29 U.S.C. § 1305-1307 21
29 U.S.C. §§ 1341-1348 6

Mandatory Victims Restitution Act (2010)
42 U.S.C. § 3663A 18

Legislative History

2 Legislative History of the Employee Retirement Income Security Act of 1974 94th Cong. (Comm. Print 1976) 13, 16

120 CONG. REC. 29928 (1974) 3

120 CONG. REC. S15737 (daily ed. Aug. 22, 1974), *reprinted in* 1974 U.S.C.C.A.N. 5177 27

H.R. REP. NO. 93-533 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639 ..... 15, 16

H.R. REP. NO. 93-807 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639 27

H.R. CONF. REP. NO. 93-1280 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 5038 21

Miscellaneous Pension Bills: Hearings Before the Subcomm. on Private Pension Plans and Emp. Fringe Benefits of the S. Comm. on Fin., 96th Cong. (Comm. Print Dec. 4, 1979) 7

Private Pension Plans, 1966: Hearings Before the Subcomm. on Fiscal Policy of the J. Econ. Comm., 89th Cong., 104-28 (1966) 5

S. REP. NO. 85-1440 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 4137 13

S. REP. NO. 93-127 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4838 ..... *passim*

S. REP. NO. 93-383 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4890 13

S. REP. NO. 1440, 85th Cong., 2d Sess. (1958) 14

Subcomm. on Labor of the S. Comm. on Lab. and Pub. Welfare, Legislative History of the Employee Retirement Income Security Act of 1974: Pub. L. No. 93-406, Vol. III (U.S. Gov't. Printing Off. 1976) 31

Miscellaneous

Advocate Health and Hospitals Corporation, *Form 990, Return of Org. Exempt From Income Tax* (2014), https://goo.gl/ohNm 3r 10, 11, 12

Advocate Health Care, *About Advocate*, https://goo.gl/DfXaBa 9

Advocate Health Care, *Executive Profiles*, https://goo.gl/DfMYRD 12

Advocate Health Care Network and Subsidiaries, Inc., *Consol. Fin. Statements and Supplementary Info., Years Ended December 31, 2015 and 2014 With Reports of Independent Auditors* (2016), https://goo.gl/nBvPKD 8, 10, 11, 12

David Barkholz, *Dignity and Catholic Health Initiatives are in merger talks*, MODERN HEALTHCARE, Oct. 24, 2016, https://goo. gl/CSMJpW 9

Hazel Bradford, *Participants sue over church-plan status for Holy Cross Hospital pension fund*, PENSIONS & INVESTMENTS, June 7, 2016, http://goo.gl/780Bf5 ..... 23, 28

Danica Coto, *Puerto Rico church strips teachers of pension amid crisis*, ASSOCIATED PRESS, Apr. 12, 2016, https://goo.gl/QCEAZs 3

Dignity Health, *About Us*, https://goo.gl/nnS2Ue 8, 9

Dignity Health and Subordinate Corporations, *Consol. Fin. Statements as of and for the Years Ended June 30, 2015 and 2014 and Independent Auditors' Report* (2015), https://goo.gl/OVpzDM 10, 11, 12

Dignity Health, *Form 990, Return of Org. Exempt From Income Tax* (2013), https://goo.gl/Goa0Qy 10, 11, 12

Dignity Health, *Governance and Leadership*, https://goo.gl/Z3pwyL (last visited Feb. 15, 2017) 9, 12

Emp. Benefit Res. Inst., Sudipto Banerjee, *Income Composition, Income Trends, and Income Shortfalls of Older Households*, EBRI ISSUE BRIEF NO. 383, Feb. 2013, https://goo.gl/k4LeVA 3

Eric Fontinelle, *Outliving Your Retirement Savings*, FORBES, May 24, 2010, https://goo.gl/MD1p40 4

Adam Geller, Associated Press, *Workers find retirement money jeopardized by loophole treating hospitals, agencies as churches*, FOX NEWS, Oct. 5, 2013, https://goo.gl/GLR0JV 23, 28

Michael S. Gordon, *Overview: Why Was ERISA Enacted?* in U.S. Sen. Special Comm. on Aging, 98th Cong., The Employee Retirement Income Security Act of 1974: The First Decade (1984) 25

Claire Hughes, *Retirees of Former Schnectady Hospital Face Pension Loss*, TIMES UNION, Jan. 10, 2017, https://goo.gl/AzPuuW 24, 28

Beth Kutscher, *Dignity's acquisition of U.S. HealthWorks helped bolster fiscal 2013 revenue*, MODERN HEALTHCARE, Dec. 26, 2013, https://goo.gl/MzDqEF 9

John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207 (1991) 14, 15, 29

JOHN H. LANGBEIN, DAVID A. PRATT, & SUSAN J. STABILE, PENSION AND EMPLOYEE BENEFIT LAW (Robert C. Clark et al. eds., 5th ed.) 14, 20, 22

Mary Jo Layton, *Retirees from St. Mary's Hospital in Passaic may lose their pensions in sale,* THE RECORD, Apr. 26, 2013, https://goo.gl/QbH21o 23, 28

Mary E. O'Leary, *New Haven's St. Raphael workers face decision on pensions,* NEW HAVEN REGISTER, July 18, 2013, https://goo.gl/HSROJA 24, 28

Press Release, Pension Benefit Guaranty Corporation, In Reversal, PBGC Covers Pension of Hospital Center at Orange (May 10, 2013), https://goo.gl/HSDt1v 23, 28

Ronald C. Rak, Saint Peter's HealthCare System CEO, *Saint Peter's University Hospital meets the community's needs,* NJ.com, Nov. 23, 2016, https://goo.gl/d2i1dL 8, 9

Chris Rauber, *Dignity Health's acquisition of U.S. HealthWorks quietly closes,* SAN FRANCISCO BUSINESS TIMES, Aug. 15, 2012, https://goo.gl/WGCXzl 9

Saint Peter's Healthcare System, Inc., *Consol. Fin. Statements and Supplementary Info., Years Ended December 31, 2015 and 2014 With Report of Independent Auditors* (2016), https://goo.gl/KnWlHf 11, 12

Saint Peter's Healthcare System, Inc., *Form 990, Return of Org. Exempt From Income Tax* (2014), https://goo.gl/jpEcfq 10, 11, 12

Norman Stein et al., *An Article of Faith: The Gratuity Theory of Pensions and Faux Church Plans*, EMP. BENEFITS COMM. NEWSL. (ABA Section of Labor and Emp't Law, Chicago, Ill.), Summer 2014, https://goo.gl/wlYJbZ 2, 7, 17

Symposium, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFFALO L. REV. 683 (2001) 15, 24

Mary Williams Walsh, *I.R.S. Reversal on 'Church' Pension Plan Rescues a Fund*, THE NEW YORK TIMES, Apr. 1, 2013, https://goo.gl/16ecS2 ..... 23, 28

Stephen Williams, *Hospital pension fund in trouble*, DAILY GAZETTE, Jan. 16, 2017, https://goo.gl/9K3hst 3

JAMES A. WOOTEN, ERISA: A POLITICAL HISTORY (2004) ..... *passim*

INTEREST OF AMICI CURIAE[1]

AARP is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect older people's financial security, health, and well-being. AARP Foundation — AARP's charitable affiliate — creates and advances effective solutions that help low-income individuals fifty and older to secure the essentials and to prevent them from falling into poverty during retirement. Among other things, AARP and AARP Foundation seek to increase the availability, security, equity, and adequacy of public and private pension, health, disability, and other employee benefits that countless members and older individuals receive or may be eligible to receive, including through participation as amicus curiae in state and federal courts.[2]

---

[1] Amici state that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or any person or entity other than AARP, AARP Foundation, AARP's members, and their counsel, contributed money intended to fund preparing or submitting this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

[2] Amici either singly or jointly have participated as amicus curiae in numerous cases to protect the rights of workers and their beneficiaries under ERISA. *See, e.g.*, *Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Ben. Plan*, 136 S. Ct. 651 (2016); *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008); *Rollins v. Dignity Health*, 830 F.3d 900 (9th Cir. 2016); *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016); *Kaplan v. St. Peter's Healthcare Sys.*, 810 F.3d 175 (3d Cir. 2015).

Congress enacted the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (2012), after assembling a record that showed a history and pattern of employers failing to provide promised employee benefits, a lack of disclosure and transparency, and varied and numerous financial abuses. Congress intended ERISA to protect "the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b); *see also, e.g., Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361-62 (1980). Although Congress did not require that every pension plan be covered by ERISA,[3] Congress did limit the exemptions to ERISA's coverage due to the abuses it uncovered and the remedial nature of the legislation.[4]

Participants and beneficiaries in private employer-sponsored employee benefit plans must be able to rely on promised pension benefits because the quality of these workers' lives in retirement depends

---

[3] Although amici's focus is the impact of the church plan exemption on pension plans due to the significant negative effects of underfunded plans, make no mistake that the loss of ERISA protections for participants in welfare plans is just as crucial. Many of these organizations cherry pick the use of the church plan exemption — asserting ERISA coverage when it benefits them particularly in welfare plans, but not when they must comply with pension requirements.

[4] *See generally* Norman Stein et al., *An Article of Faith: The Gratuity Theory of Pensions and Faux Church Plans*, EMP. BENEFITS COMM. NEWSL. (ABA Section of Labor and Emp't Law, Chicago, Ill.), Summer 2014, https://goo.gl/wlYJbZ (noting that ERISA's predecessor, the Welfare and Pension Plan Disclosure Act, exempted all tax-exempt organizations from its coverage, whereas ERISA only exempts church and governmental plans).

substantially on their ability to obtain those benefits that they have been promised. As longevity and, as a result, the amount of money needed to live comfortably in retirement increases, retirement plans become more crucial to individuals' retirement security. Indeed, for many people, outside of Social Security, employee benefit plans are their main source of retirement income.[5]

Mid-career and older participants have the most to lose if exempt church plans have insufficient funds to pay benefits because these individuals have little time to make up any potential benefit shortfall.[6] When an employer reneges on its pension promises, it wreaks financial havoc upon older employees and their families by destroying a lifetime of working and planning for their retirement years.[7] Retirement typically occurs at an age when employees cannot

---

[5] *See* Emp. Benefit Res. Inst., Sudipto Banerjee, *Income Composition, Income Trends, and Income Shortfalls of Older Households*, EBRI ISSUE BRIEF NO. 383, Feb. 2013, at 5, https://goo.gl/k4LeVA (pensions and annuities are the second-most important source of income for most older households).

[6] *See, e.g.*, Stephen Williams, *Hospital pension fund in trouble*, DAILY GAZETTE, Jan. 16, 2017, https://goo.gl/9K3hst; Danica Coto, *Puerto Rico church strips teachers of pension amid crisis*, ASSOCIATED PRESS, Apr. 12, 2016, https://goo.gl/QCEAZs.

[7] 120 CONG. REC. 29928 (1974) (statement of Sen. Williams) ("[T]oo many workers, rather than being able to retire in dignity and security after a lifetime of labor rendered on the promise of a future pension, find that their earned expectations are not to be realized"); *see also* S. REP. NO. 93-127, at 1-9 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4838-44.

start all over again in hopes of obtaining a new pension.[8] For those already retired, it is just too late.

These cases will have a significant impact on the funding and integrity of employee benefit plans, the ability of individual participants to obtain accurate information to make informed decisions concerning their benefits, and the ability of individual participants to obtain their promised retirement benefits. In light of the significance of the issues presented by this case, which directly bears on the retirement security of millions of Americans, including AARP members, amici respectfully submit this brief.

SUMMARY OF ARGUMENT

Petitioners are businesses, not churches. They deliver healthcare services on national, multi-state, or regional levels. They operate and compete for market share against other large non-profit health systems that are covered by ERISA. ERISA's protections are meant to apply to all employers offering employee plans, unless those plans meet the narrow exemption that Congress designed. 29 U.S.C. § 1003(b)(2). The necessity for such protections is well-known.

In the 1950s, after investigation and studies, Congress became cognizant of the widespread

---

[8] *See, e.g.*, Eric Fontinelle, *Outliving Your Retirement Savings*, FORBES, May 24, 2010, https://goo.gl/MD1p40 ("Many retirees may not be able to go back to work due to failing health or lack of skills.").

damage that the loss of promised and earned pension benefits caused to workers' lives and their retirement security.[9] Congress concluded that current laws, including the Internal Revenue Code and state laws, were inadequate to protect employee benefit plans.[10] S. REP. NO. 93-127 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4842. Congress believed that if employees' rights to their accrued pension benefits are forfeitable, they have no assurances that they will ultimately receive a pension. *See Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004) (recognizing the "centrality of ERISA's object of protecting employees' justified expectations of receiving the benefits their employers promise them"). Congress sought to prevent employers from pulling the rug out from under employees participating in a pension plan after they met the plan's eligibility requirements. *See Nachman Corp.*, 446 U.S. 359, 375 (1980).

---

[9] *See Private Pension Plans, 1966: Hearings Before the Subcomm. on Fiscal Policy of the J. Econ. Comm.*, 89th Cong., 104-28 (1966) (statement of Clifford M. MacMillan, Vice-President, Studebaker Corp.) (describing the closing of the Studebaker automobile plant where approximately 7,000 employees lost some or all of their promised pension benefits).

[10] The Brief *amici curiae* of the Illinois Conference of the United Church of Christ, et al., states that church plans are regulated under the Internal Revenue Code and state laws. Indeed, some of the Internal Revenue Code sections cited were in effect prior to ERISA's enactment. This argument misses the point. Congress determined that pre-ERISA standards were insufficient to protect employee benefit plans.

In its statement of findings and declaration of policy, Congress noted that "despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans." 29 U.S.C. § 1001(a). Congress designed ERISA to prescribe minimum vesting and accrual standards in response to such problems. 29 U.S.C. §§ 1053, 1054. To ensure that employee pension expectations are not thwarted, ERISA establishes a comprehensive disclosure scheme, 29 U.S.C. §§ 1021-30; minimum rules for employee participation, 29 U.S.C. § 1052; funding standards to increase solvency of pension plans, 29 U.S.C. §§ 1081-1085; fiduciary standards for plan fiduciaries, 29 U.S.C. §§ 1101-1114; and an insurance program in case of plan termination, 29 U.S.C. §§ 1341-1348; *accord Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 n.5 (1981). Congress also provided standards for benefit payments, 29 U.S.C. §§ 1055, 1056, and a procedure to dispute benefit denials, 29 U.S.C. § 1133.

None of these fundamental safeguards applies to church plans. Thus, church plans can design their pension plans in any way they desire. Pension provisions could certainly include, among other harmful possibilities, allowing for the elimination or reduction of accrued benefits, requiring five or even thirty years of service to achieve a non-forfeitable benefit (rather than ERISA's three years of vesting), providing disproportionate benefit accruals in the later years of a participant's employment, stopping accrual of a participant's benefits at age 65, or not

providing for a joint and survivor annuity. Extending ERISA's limited church plan exemption to non-churches like Petitioners creates significant risks and changes settled expectations for retiring workers. If this Court blesses their exemption from ERISA protections, pension provisions similar to those listed above undoubtedly will become more common and underfunding of these pensions will continue or increase, leaving plan participants with only their employers' empty promises.

ARGUMENT

I. PETITIONERS ARE BUSINESSES, NOT CHURCHES, AND THUS ARE NOT ENTITLED TO TAKE ADVANTAGE OF ERISA'S CHURCH PLAN EXEMPTION.

Congress enacted ERISA because, based on its studies and investigations, it did not trust businesses to protect and properly fund their pensions. Significantly, Congress did not exempt non-profit organizations, but treated them the same as any other business. *See supra* note 4. In contrast, in fashioning the church plan exemption, the legislative history demonstrated that Congress trusted churches to protect and properly fund the promised pension benefits for their employees due to the church's moral obligation to their employees. *See Miscellaneous Pension Bills: Hearings Before the Subcomm. on Private Pension Plans and Emp. Fringe Benefits of the S. Comm. on Fin.*, 96th Cong. 364 (Comm. Print Dec. 4, 1979) (statement of Sen. Herman E.

Talmadge, Member, S. Comm. on Fin.). Here, Petitioner hospitals are not churches, but businesses.

Congress designed ERISA's church plan exemption to apply narrowly. *See infra* Section II.C. As its label implies, the exemption was intended only to apply to actual churches. However, like Petitioners in this case, many of the organizations taking advantage of the church plan exemption are big businesses. They are organized to supply healthcare services, to compete with similar institutions, which do not claim the church plan exemption for their pension plans, and operate with primarily laypersons — including the CEOs — to achieve their goals. Indeed, they are not organized to deliver religious worship services.[11]

Petitioners illustrate an all-too-common distortion of the church plan exemption. These entities are not churches. They are big businesses, organized like similar non-profit health systems.

---

[11] *See* Dignity Health, *About Us*, https://goo.gl/nnS2Ue (last visited Feb. 15, 2017) (describing Dignity as a health care delivery system); Advocate Health Care Network and Subsidiaries, Inc., *Consol. Fin. Statements and Supplementary Info., Years Ended December 31, 2015 and 2014 With Reports of Independent Auditors* 8 (2016), https://goo.gl/nBvPKD ("Substantially all expenses of [Advocate] are related to providing health care services."); Ronald C. Rak, Saint Peter's HealthCare System CEO, *Saint Peter's University Hospital meets the community's needs*, NJ.com, Nov. 23, 2016, https://goo.gl/d2i1dL (statement from CEO, describing Saint Peter's as the parent company of Saint Peter's healthcare delivery system).

Petitioners are all large employers organized to deliver healthcare services on national, multi-state, or regional levels.[12] They are managed by a board of directors[13] and pursue aggressive growth strategies through health[14] and non-health

---

[12] Dignity employs approximately 60,000 people in 21 states. It is the fifth largest health system in the nation and the largest hospital provider in California. Dignity Health, *About Us*, *supra* note 11. Advocate is one of Chicago's largest employers with more than 35,000 associates, including 6,300 affiliated physicians and 11,000 nurses. It is the largest health system in Illinois, offering more than 450 sites of care, with 12 acute-care hospitals. Additionally, it has the State's largest physician network of primary physicians, specialists and sub-specialists. Advocate Health Care, *About Advocate*, https://goo.gl/DfXaBa (last visited Feb. 15, 2017). Saint Peter's employs over 3,300 employees, 1,028 credentialed physicians, and its children's hospital is one of the largest in New Jersey. *See* Ronald C. Rak, Saint Peter's Healthcare System CEO, *supra* note 11.

[13] Dignity Health, *Governance and Leadership*, https://goo.gl/Z3pwyL (last visited Feb. 15, 2017).

[14] In 2016, Dignity Health and Catholic Health Initiatives entered into merger talks. A full merger would create the nation's largest not-for-profit hospital company, with a combined revenue of $27.6 billion, and leave it trailing only Kaiser Permanente as the largest not-for-profit health system. David Barkholz, *Dignity and Catholic Health Initiatives are in merger talks*, MODERN HEALTHCARE, Oct. 24, 2016, https://goo.gl/CSMJpW; *see also* Chris Rauber, *Dignity Health's acquisition of U.S. HealthWorks quietly closes*, SAN FRANCISCO BUSINESS TIMES, Aug. 15, 2012, https://goo.gl/WGCXzl (reporting that Dignity's acquisition of U.S. HealthWorks "is part of Dignity's aggressive plans to . . . become a national player in the near future."); Beth Kutscher, *Dignity's acquisition of U.S. HealthWorks helped bolster fiscal 2013 revenue*, MODERN HEALTHCARE, Dec. 26, 2013, https://goo.gl/MzDqEF (At time of the merger, U.S. HealthWorks had 172 locations in 15 states,

ventures.[15] Global investments play a significant role in how these entities build revenue.[16] In particular, they all have financial accounts in the tax haven of the Cayman Islands.[17] Their enormous revenues evidence success in this regard.[18]

---

which grew to 208 locations in 20 states a year after the merger.).

[15] *See* Dignity Health and Subordinate Corporations, *Consol. Fin. Statements as of and for the Years Ended June 30, 2015 and 2014 and Independent Auditors' Report* 10 (2015), https://goo.gl/OVpzDM ("Dignity Health also invests in alternative investments through limited partnerships. Alternative investments are comprised of private equity, real estate, hedge fund and other investment vehicles."); Advocate, *Consol. Fin. Statements*, *supra* note 11, at 40 (approximately $916 million in total assets in 2015, including: over $206 million in hedge funds, almost $100 million in private equity funds, and about $11 million in real estate investments); Dignity Health, *Form 990, Return of Org. Exempt From Income Tax* at 1 (2013), https://goo.gl/Goa0Qy (more than $23 million in revenue for business unrelated to "the delivery of affordable health care, advocacy for the poor and community partnerships"); Advocate Health and Hospitals Corporation, *Form 990, Return of Org. Exempt From Income Tax* at 1 (2014), https://goo.gl/ohNm3r (just short of $60 million in revenue for business unrelated to "serv[ing] health needs of communities . . .").

[16] Dignity has investments of over $2.1 billion in Central America and the Caribbean, and Europe, including Iceland and Greenland. Dignity Health, *Form 990* at Schedule F, Part I, https://goo.gl/Goa0Qy. Advocate has activities in Central America and the Caribbean. Advocate, *Form 990* at Schedule F, Part I, https://goo.gl/ohNm3r.

[17] *See* Dignity Health, *Form 990* at Schedule R, Part IV, https://goo.gl/Goa0Qy; Advocate, *Form 990* at Schedule R, Part IV, https://goo.gl/ohNm3r; Saint Peter's Healthcare System,

Although Petitioners claim religious affiliations, they operate much like other large non-profit health systems that are covered by ERISA. Petitioners do not rely on any funding from churches.[19] Instead, they all rely on revenue bonds to raise money, and have significant sums invested in, among other things, fixed-income securities, equity securities, and hedge funds.[20]

Patients pay for services as they would pay any health care provider that does not assert its retirement plan is a church plan — through, among other means, insurance, self-payment, Medicare, and

---

Inc., *Form 990, Return of Org. Exempt From Income Tax* at Schedule R, Part IV (2014), https://goo.gl/jpEcfq.

[18] Dignity revenue: $8.6 billion in 2014. *See* Dignity Health, *Form 990* at 1, https://goo.gl/Goa0Qy. Advocate revenue: $4.3 million in 2014. *See* Advocate, *Form 990* at 1, https://goo.gl/ohNm3r. Saint Peter's revenue: $37 million in 2014. *See* Saint Peter's, *Form 990* at 1, https://goo.gl/jpEcfq.

[19] J.A. 258, 428, 777.

[20] *See* Advocate, *Consol. Fin. Statements*, *supra* note 11, at 23 (more than $5.4 billion in total investments); Dignity, *Consol. Fin. Statements*, *supra* note 15, at 18 (total investments and assets, limited as to use, amounted to $6.5 billion in 2015); Saint Peter's Healthcare System, Inc., *Consol. Fin. Statements and Supplementary Info., Years Ended December 31, 2015 and 2014 With Report of Independent Auditors* 22, 36 (2016), https://goo.gl/KnWlHf (fair value of more than $87 million in securities for 2015).

Medicaid.[21] Those in key leadership and management positions are filled primarily by lay people.[22] Like other chief executive officers of for-profit systems and large non-profit health care systems, the CEOs of these entities are well compensated.[23]

These entities are large corporations, they compete with similarly structured non-profit health systems and they bear no resemblance to churches. Petitioners are enormous conglomerates built to deliver health services — not religious worship. Congress surely did not intend for businesses, with investments in the Cayman Islands, well-compensated CEOs, and revenues in the billions, to

---

[21] *See* Advocate, *Consol. Fin. Statements*, *supra* note 11, at 16; Dignity, *Consol. Fin. Statements*, *supra* note 15, at 16; Saint Peter's, *Consol. Fin. Statements*, *supra* note 20, at 18.

[22] Dignity Board consists of thirteen members, 2 of which are not lay people). *See* Dignity Health, *Governance and Leadership*, *supra* note 13. All but one of twelve people on Advocate's leadership team is a layperson. Advocate Health Care, *Executive Profiles*, https://goo.gl/DfMYRD (last visited Feb. 15, 2017).

[23] Dignity's CEO received over $8 million in 2013, and at least nineteen officers or key employees received compensation in excess of one million dollars. Dignity, *Form 990* at Schedule J, Part II, https://goo.gl/Goa0Qy. Advocate's CEO received over $7.6 million in 2014, and at least eight officers or key employees received reportable compensation in excess of one million dollars. Advocate, *Form 990* at Schedule J, Part II, https://goo.gl/ohNm3r. Saint Peter's CEO received close to one million dollars in 2014, and at least three officers or key employees received reportable compensation in excess of half a million dollars. Saint Peter's, *Form 990* at Schedule J, Part II, https://goo.gl/jpEcfq.

claim ERISA's church plan exemption to the detriment of their employees.

II. CONGRESS ENACTED ERISA IN RESPONSE TO BROKEN PENSION PROMISES TO ENSURE THAT EMPLOYEES RECEIVE THEIR PENSIONS.

A. Employers Promise Pensions to Employees As Deferred Compensation.

Congress has consistently recognized that "the benefits the employers provide are a form of compensation." S. REP. NO. 85-1440, at 3 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 4137, 4139 (legislative history of the Welfare and Pension Plans Disclosure Act of 1958 (WPPDA), ERISA's predecessor). "[T]he private pension plan is a means for transferring earnings during the working years into income for a decent living in the older years." 2 Legislative History of the Employee Retirement Income Security Act of 1974 ("Legislative History"), 94th Cong. (Comm. Print 1976). Quite simply, pensions are a form of deferred compensation, and their protection is crucial to employees' financial security. *See, e.g.*, S. REP. NO. 93-383, at 17, 25-26 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4890, 4903, 4910-11 (ERISA's legislative history describing pensions as "deferred wages"); S. REP. NO. 93-127, at 3 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4839 (same); *accord*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 445 (1999); *Lockheed Corp. v. Spink*,

517 U.S. 882, 893-94 (1999) ("[A]mong the ... legitimate benefits that a plan sponsor may receive from the operation of a pension plan are attracting and retaining employees [and] paying deferred compensation."); John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 209 (1991) (pension plan assets are placed in trust form to protect deferred wages).

B. Congress Enacted ERISA In Response To Broken Pension Promises.

At the behest of President Dwight D. Eisenhower, in 1954, Congress began investigating pension plans in order to protect these funds for the workers covered by these plans. Congress found extensive evidence of kickbacks, embezzlement, and mismanagement during its four years of hearings, studies, and investigation. It concluded that the solution was to provide disclosures and information to the participants "which will permit them to determine (1) whether the program is being administered efficiently and equitably, and (2) more importantly, whether or not the assets and prospective income of the programs are sufficient to guarantee the benefits which have been promised to them." S. REP. NO. 1440, 85th Cong., 2d Sess., 12 (1958); *see generally Malone v. White Motor Corp.*, 435 U.S. 497, 506-507 (1978). In response, Congress enacted the WPPDA. JOHN H. LANGBEIN, DAVID A. PRATT, & SUSAN J. STABILE, PENSION AND EMPLOYEE BENEFIT LAW 84 (Robert C. Clark et al. eds., 5th ed. 2010).

Subsequently, a confluence of incidents made it apparent that the WPPDA was inadequate to protect employees' pensions. The most spectacular incident was the failure of Studebaker Motor Company and its pension plan. *See* JAMES A. WOOTEN, ERISA: A POLITICAL HISTORY 8-10, 51-52, 80 (2004). It was not an accident that employees had no vesting rights in their Studebaker pension. *See* Symposium, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFFALO L. REV. 683, 694-695 (2001). At the time that Studebaker folded, its pension plan was not properly funded; as a result, many employees received no pension distribution. *Id.* at 695-697, 706, 716. Moreover, the kickbacks, embezzlement, and mismanagement that Congress had previously uncovered in other benefit plans had only become more egregious. *See* Langbein, *The Supreme Court Flunks Trusts*, *supra* at 210 (ERISA passed to curb looting and other abuses); JAMES A. WOOTEN, ERISA: A POLITICAL HISTORY at 118, 158 (citing examples such as Jimmy Hoffa receiving loans that Central States Pension Fund made for his benefit; a union officer and "trustee for life" diverting several million dollars from welfare and pension plans to Liberia and Puerto Rico; Tony Boyle accused of abusing position as United Mine Workers Funds trustee).

Congress understood that ERISA's predecessor was "weak in its limited disclosure requirements and wholly lacking in substantive fiduciary standards." H.R. REP. NO. 93-533, at 4 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4642; S. REP. NO. 93-127, at

4, 1974 U.S.C.C.A.N. at 4841. Indeed, the House Education & Labor and the Senate Labor & Public Welfare Committees' reports concluded:

> It is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if the conditions were stated in a misleading or incomprehensible manner in plan booklets. Subcommittee findings were abundant in establishing that an average plan participant, even where he has been furnished an explanation of his plan's provisions, often cannot comprehend them because of the technicalities and complexities of the language used.

H.R. REP. NO. 93-533, at 8, 1974 U.S.C.C.A.N. at 4646; S. REP. NO. 93-127, at 11, 1974 U.S.C.C.A.N. at 4847, *reprinted in* 2 Legislative History at 2348. These reports also emphasized problems caused by a lack of vesting, funding, and reinsurance provisions in the current law. 1974 U.S.C.C.A.N. at 4844-4847. Accordingly, Congress enacted ERISA over 40 years ago to protect retirement benefits and plan assets through a "comprehensive and reticulated" system, designed to assure that employer-sponsored pension plans actually pay employees the benefits they were promised. *Nachman Corp.*, 446 U.S. at 361, 374-75 (purpose of ERISA was to prevent the "great personal tragedy" suffered by employees whose retirement

benefits were not paid). This Court should affirm this construction.

C. Because Congress Intended That ERISA Cover The Majority Of Employee Benefit Plans To Ensure That Employees Receive Their Pensions, The Church Plan Exemption Should Be Narrowly Construed.

Ensuring that ERISA's protections remain in place throughout an employee's work life and retirement is crucial to an individual's retirement security. Congress sought to accomplish this in part by permitting only the most limited exemptions to ERISA's protections.[24] *See* 29 U.S.C. § 1003(b).

In other contexts, this Court has consistently held that exemptions to remedial statutes are to be narrowly construed. *See Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 614 (1981) ("The comprehensive character of the procedures outlined in the [Longshoremen's and Harbor Workers' Compensation Act] precludes the fashioning of an entirely new set of remedies to deal with an aspect of a problem that Congress expressly addressed"); *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) (in construing the Federal Property and Administrative Services Act of 1949, the Court held that "where Congress explicitly enumerates certain

---

[24] *See* Stein et al., *An Article of Faith: The Gratuity Theory of Pensions and Faux Church Plans*, *supra* note 4.

exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of contrary legislative intent"); *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("Any exemption from such humanitarian and remedial legislation [such as the Fair Labor Standards Act] must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.").

It is clear that an employee benefit plan must meet all of ERISA's requirements if it does not meet the precise conditions of an exemption. This Court has narrowly construed other ERISA exemptions that limit participant protections. *See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 97, 105-106 (1993) (acknowledging a "tight reading of exemptions from comprehensive schemes of this kind," but limiting exemption to the precise words of the statute); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990) (declining to find an exception to ERISA's anti-alienation provision and asserting that "[i]f exceptions to this policy are to be made, it is for Congress to undertake that task"), *superseded by statute,* Mandatory Victims Restitution Act, 42 U.S.C. § 3663A (2010).

In construing the church plan exemption, the circuit courts have faithfully applied this Court's teachings. *See Stapleton v. Advocate Health Care*

Network, 817 F.3d 517, 526 (7th Cir. 2016) ("ERISA . . . was written to protect workers who have invested their retirement savings into employer-run financial plans. And, because it 'is a 'remedial statute' [it] should be 'liberally construed in favor of protecting the participants in employee benefit plans.'") (quoting *Kaplan*, 810 F.3d at 182); *Kaplan v. St. Peter's Healthcare Sys.*, 810 F.3d 175, 182 (3d Cir. 2015) ("construing plans established by church hospitals to be exempt 'would achieve quite the opposite' result of the canon directing us to construe exemptions narrowly"). This Court should affirm its teachings.

III. BROAD APPLICATION OF THE CHURCH PLAN EXEMPTION WOULD DEPRIVE EMPLOYEES OF SAFEGUARDS THAT CONGRESS ENACTED TO PROTECT EMPLOYEE PENSIONS.

ERISA's main purpose is to ensure that employees receive their promised employee pension and welfare benefits. 29 U.S.C. § 1001(a)-(b). For pension plans, Congress sought to achieve that purpose by providing various protections, including minimum funding protections and insurance guarantees, limitations on reducing or eliminating pension benefits, mandated fiduciary responsibilities, and a comprehensive disclosure scheme. *See supra* p. 6. Reading the church plan exemption broadly deprives these participants of each carefully crafted ERISA requirement and leaves them vulnerable to broken pension promises. *See Stapleton*, 817 F.3d at 526-527 (recognizing the perils of unregulated pension plans); *Kaplan*, 810 F.3d at 182 ("[E]xempt

church plans lack many of the protections associated with ERISA"); *A-T-O-Inc. v. Pension Benefit Guar. Corp.*, 634 F.2d 1013, 1020 (6th Cir. 1980) (ERISA should be interpreted to "protect employees' expectations in their vesting pension benefits"); LANGBEIN et al., PENSION AND EMPLOYEE BENEFIT LAW, *supra* p. 15, at 105 (providing examples of the poor financial health of exempt governmental plans).

A. Broad Application Of The Church Plan Exemption Would Deprive Employees Of ERISA's Minimum Plan Funding Protections And Insurance Guarantees.

ERISA arose in the wake of the failure of Studebaker Motor Company and its pension plan — a watershed moment in pension history. Studebaker had agreed to pension increases, but had not funded these pension promises. When the company failed, the pension was underfunded by over $15 million. Thousands of employees, including some who had worked their whole lives for the company, lost all or most of their pensions. *See* JAMES A. WOOTEN, ERISA: A POLITICAL HISTORY at 8-10, 51, 80; S. REP. NO. 93-127, 1974 U.S.C.C.A.N. at 4846-4847 (noting 683 pension plan terminations for the first seven months of 1972 affecting 20,700 pension participants).

Moreover, Congress found that many plans only funded their plans to the extent required by the Internal Revenue Service; that is, employers made contributions in an amount equal to that year's

annual pension liabilities. These contributions did not fund past service liabilities or make up for investment losses. "Without adequate funding, a promise of a pension may be illusory and empty." *Id.* at 4845-4846.

In response to these losses and the hardships it caused workers, Congress established minimum funding requirements for pension plans to ensure that they "will accumulate sufficient assets within a reasonable period of time to pay benefits to covered employees when they retire." H.R. CONF. REP. No. 93-1280, at 283 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 5038, 5064. Plan sponsors must make periodic contributions as participants accrue benefits and must certify that these contributions comply with ERISA's established standards. 29 U.S.C. §§ 1082, 1083.

As a safeguard, Congress also established a system of plan termination insurance to protect individuals against the loss of pension benefits, in the event a defined benefit pension plan terminates with insufficient assets or the employer becomes insolvent. This program guarantees the payment of pension benefits for individuals in these plans according to certain statutory limits. The Pension Benefit Guaranty Corporation ("PBGC") administers the program, which is financed exclusively through employer premiums, investment income, the assets of terminated plans, and recoveries on claims for termination liability. 29 U.S.C. §§ 1302, 1305-1307.

These minimum funding requirements do not apply to church plans. 29 U.S.C. § 1003(b); *see also Kaplan*, 810 F.3d at 182 ("These plans need not comply with a host of ERISA provisions, including fiduciary obligations and minimum-funding rules."). Thus, there is no guarantee that the employer will properly fund the plan. Moreover, if ERISA does not apply to these plans, employers will have no obligation to pay PBGC premiums. Thus, these retirement plan participants are currently ineligible for PBGC protection if the plan terminates with insufficient assets.[25] This would leave them in the same dire predicament as Studebaker employees were in over forty-five years ago — with broken promises, instead of their benefits.

This is not merely theoretical. To be sure, there are a number of cases where church plans, operating without ERISA's safeguards, are unable to fulfill their commitments to employees because of underfunding. By cutting pension benefits, plans break their promises to employees and take their deferred compensation. *See, e.g.*, St. Anthony Medical Center Retirement Plan (40% cut back on pension benefits for 1,900 participants when plan

---

[25] Some of these "church" plans contain a "fund specific promise." Under a fund specific promise, only money in a fund designated by the employer is available to pay plan benefits. Thus, at termination, these plans will disburse pension benefits in a specified order until there are no more funds. Moreover, state law requires no more. ERISA bans these fund-specific promises for ERISA-covered retirement plans because they limit the money available for pensions to whatever the employer chooses to provide—which could be nothing. *See* LANGBEIN et al., PENSION AND EMPLOYEE BENEFIT LAW, *supra* p. 15, at 244.

terminated);[26] Pension Plan for Employees of Holy Cross Hospitals (HCH) (more than 50% loss in benefits, underfunded by $31 million)[27]; Ausburg Fortess, Publishing House for the Evangelical Lutheran Church in America (more than 60% shortfall in expected benefits);[28] Hospital Center at Orange Pension Plan (after eight-year internal review, IRS reversed decision recognizing Plan as a church plan; PBGC announced that it would cover $30 million in liabilities);[29] Retirement Plan for St. Mary's Hospitals in Passaic for Non-Union Employees (underfunded by $36 million in 2015, 1,100 participants told funds would be exhausted in the future);[30] Retirement Plan for Employees of The

---

[26] *See* Adam Geller, Associated Press, *Workers find retirement money jeopardized by loophole treating hospitals, agencies as churches*, FOX NEWS, Oct. 5, 2013, https://goo.gl/GLR0JV.

[27] *See* Hazel Bradford, *Participants sue over church-plan status for Holy Cross Hospital pension fund*, PENSIONS & INVESTMENTS, June 7, 2016, http://goo.gl/780Bf5

[28] *See* Adam Geller, *supra* note 26.

[29] *See* Mary Williams Walsh, *I.R.S. Reversal on 'Church' Pension Plan Rescues a Fund*, THE NEW YORK TIMES, Apr. 1, 2013, https://goo.gl/l6ecS2; Press Release, Pension Benefit Guaranty Corporation, In Reversal, PBGC Covers Pension of Hospital Center at Orange (May 10, 2013), https://goo.gl/HSDt1v; Adam Geller, *supra* note 26 ("[T]he hospital . . . had unique circumstances. It was a nonreligious institution for nearly all its existence and paid insurance premiums to the PBGC for four decades.").

[30] *See* Mary Jo Layton, *Retirees from St. Mary's Hospital in Passaic may lose their pensions in sale*, THE RECORD, Apr. 26, 2013, https://goo.gl/QbH21o; Adam Geller, *supra* note 26.

Hospital of Saint Raphael (3,250 employees told they would receive reduced benefits based on revised formula due to Plan's $55 million underfunding);[31] St. Clare's Retirement Income Plan (underfunded by $35 million and expected to exhaust funds in the future).[32]

B. Broad Application Of The Church Plan Exemption Would Deprive Employees Of ERISA's Guarantee Of Pension Vesting.

Congress enacted ERISA "to make sure that if a worker has been promised a defined pension benefit upon retirement — and if he has fulfilled whatever condition are required to obtain a vested benefit – he actually will receive it." *Nachman Corp.*, 446 U.S. at 375. In ERISA's findings and declaration of policy, Congress stated, "many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans." 29 U.S.C. § 1001(a). To be sure, the lack of vesting standards in the Studebaker pension plan validated that finding. *See* Symposium, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFFALO L. REV. at 694-695. Moreover,

---

[31] *See* Mary E. O'Leary, *New Haven's St. Raphael workers face decision on pensions*, NEW HAVEN REGISTER, July 18, 2013, https://goo.gl/HSROJA.

[32] *See* Claire Hughes, *Retirees of Former Schnectady Hospital Face Pension Loss*, TIMES UNION, Jan. 10, 2017, https://goo.gl/AzPuuW.

Congressional reports found that at least 13 percent of private pension plans in the United States did not require vesting of benefits prior to retirement. S. REP. NO. 93-127, 1974 U.S.C.C.A.N. at 4845. Accordingly, Congress enacted vesting standards so that participants would have a legally enforceable right (that is, benefits are non-forfeitable and non-revocable) to their pensions after they had worked a specific amount of time. *See* 29 U.S.C. § 1053; *Alessi*, 451 U.S. at 510 n.5.

A broad application of the church plan exemption permits employers and plans to use any vesting rules, even none, that they so desire. For example, using a longer vesting schedule such as five years versus three years can make the difference between receiving a pension or not, especially for shorter service employees. Moreover, there would be no prohibition against these plans using a thirty-year vesting schedule, just like employers did before ERISA was enacted. *See* Michael S. Gordon, *Overview: Why Was ERISA Enacted?* in U.S. Sen. Special Comm. on Aging, 98th Cong., The Employee Retirement Income Security Act of 1974: The First Decade 16 (1984) (finding that numerous personal letters sent to government offices confirmed that workers were denied pension benefits despite many years on the job). This could leave employees in these plans without a legally enforceable right to a pension.

C. Broad Application Of The Church Plan Exemption Would Deprive Employees Of ERISA's Protection From Reductions To, Or Elimination Of, Their Pension Benefits.

Congress recognized that vesting requirements alone could not achieve the goal of protecting "employees' justified expectations of receiving the benefits their employers promise them." *Heinz*, 541 U.S. at 743; *see generally* 29 U.S.C. § 1001(a). Indeed, in a defined benefit plan, benefit accruals are one of the factors in determining a participant's final benefit.[33] Consequently, Congress established benefit accrual requirements, *see* 29 U.S.C. §§ 1002(23)(A), 1054, to work hand in glove with the vesting requirements. *See* 29 U.S.C. §§ 1002(19), 1053.

> ERISA's vesting provisions could be thwarted if employers were permitted too much latitude in defining accrued benefits. As Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, stated "The vesting provisions apply to whatever benefit an employee has accrued under a plan. It is, therefore, important to assure that a plan's accrual formula is

---

[33] *Lockheed Corp. v. Spink*, 517 U.S. 882, 897 (1999) ("A reduction in total benefits due is not the same thing as a reduction in the rate of benefit accrual; the former is the final outcome of the calculation, whereas the latter is one of the factors in the equation.").

> not inconsistent with the statutory purpose reflected in the bill's vesting provisions. A basic concern was that a plan not be permitted to use an accrual formula . . . to subvert the statutory intent to provide meaningful vested rights. . . ." 120 CONG. REC. S15737 (daily ed. Aug. 22, 1974) (statement of Sen. Williams), *reprinted in* 1974 U.S.C.C.A.N. 5177.

Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1409 (2d Cir. 1985); *see also McDonald v. Pension Plan of NYSA-ILA Pension Tr. Fund*, 320 F.3d 151, 156 (2d Cir. 2003) (explaining difference between accrued and vested benefits).

The benefit accrual standards require that a participant's benefits must accrue relatively consistently on an annual basis and cannot accrue disproportionately at the end of her career, also known as back-loading. 29 U.S.C. § 1054(a), (b)(1). By these provisions, Congress intended to prohibit an employer from "providing inordinately low rates of accrual in the employee's early years of service when he is most likely to leave the firm and . . . concentrating the accrual of benefits in the employee's later years of service when he is most likely to remain with the firm until retirement." H.R. REP. NO. 93-807, at 4688 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4688. Moreover, a plan cannot stop a participant's accrual of benefits, or lower the rate at which those benefits accrue, based on her age. 29 U.S.C. § 1054(b)(1)(H). Finally, ERISA requires

that a plan amendment cannot reduce or eliminate an earned benefit. 29 U.S.C. § 1054(g); *see also Heinz*, 541 U.S. at 743 (recognizing the "centrality of ERISA's object of protecting employees' justified expectations of receiving the benefits their employers promise them").

A broad application of the church plan exemption results in these plans being able to reduce or eliminate accrued benefits, significantly back-load formulas, and lower the rate at which benefits accrue, based on the age of the participant. For example, the Saint Raphael Hospital informed over 3,200 workers that they would not receive their promised benefits. Instead, they will receive only a portion of their pension benefits — regardless of their vested rights or accrued benefits. *See* Mary E. O'Leary, *New Haven's St. Raphael workers face decision on pensions*, *supra* note 17. This reduction in benefits reflects the employer's broken promise to its employees, which is exactly the result that Congress was trying to prevent. *See also supra* notes 26-32 and accompanying text (providing examples of church plans cutting back on participant benefits).

D. Broad Application Of The Church Plan Exemption Would Deprive Employees Of ERISA's Fiduciary Protections Against Self-dealing, Mismanagement, And Abuses.

"[I]n the wake of more than a decade of Congressional investigation into looting and other

abuses of plans by some union leaders,"[34] Congress concluded that it would safeguard employee benefits "by establishing standards of conduct, responsibility, and obligation of fiduciaries of employee benefit plans." 29 U.S.C. § 1001(b). It had previously concluded that current federal law including Internal Revenue Code provisions and state laws were inadequate to protect pensions. S. REP. NO. 93-127 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4842. Thus, Congress imposed a federal fiduciary regime in order to eliminate abuses.

ERISA requires fiduciaries to manage and administer the plan and its assets. That means that these fiduciaries must act solely in the best interests of the participants. 29 U.S.C. § 1104(a)(1). Likewise, they must act for the exclusive purpose of providing benefits and defraying reasonable expenses incurred in the administration of the plans. 29 U.S.C. § 1104(a)(1)(A). In addition, fiduciaries must discharge their duties with the highest level of loyalty and care known under the law and manage plan assets prudently. 29 U.S.C. § 1104(a)(1)(B). Plan assets must be held in trust, 29 U.S.C. § 1103, and investments must be diversified to avoid large losses to the plan. 29 U.S.C. § 1104(a)(1)(C). Finally,

---

[34] *See* Langbein, *The Supreme Court Flunks Trusts*, *supra* p. 15, at 210; *accord* JAMES A. WOOTEN, ERISA: A POLITICAL HISTORY at 158 (citing examples such as Jimmy Hoffa received loans that Central States Funds made for his benefit; a union officer and "trustee for life" diverted several million dollars from pension and welfare funds to Liberia and Puerto Rico; Tony Boyle accused of abusing position as United Mine Workers Funds trustee).

fiduciaries must act in accordance with the provisions of the plan document and other instruments governing the plan, to the extent that they are consistent with Titles I and IV of ERISA. 29 U.S.C. § 1104(a)(1)(D).

In its review of pension plan abuses, Congress determined that certain types of transactions frequently gave rise to misconduct, such as transactions between the plan and the employer. 29 U.S.C. §§ 1106(a)(1), 1002(14)(c).[35] "Before ERISA's enactment in 1974, the measure that governed a transaction between a pension plan and its sponsor was the customary arm's-length standard of conduct." *Comm'r of Internal Revenue v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993). Supplementing the general fiduciary duty requirements, and unlike state trust law requirements, Congress categorically prohibited plan fiduciaries from engaging in specific transactions that were "likely to injure the pension plan." *Id.* Therefore, Congress barred fiduciary self-dealing in plan assets and other conflict of interest transactions involving plan assets, and limited the types of assets that a plan may hold. 29 U.S.C. § 1106.

A broad application of the church plan exemption leaves such plans subject to minimal

---

[35] The Studebaker pension plan invested plan assets in the company in order to keep it afloat. When the company failed, so did these investments, exacerbating the pension plan's underfunding. JAMES A. WOOTEN, ERISA: A POLITICAL HISTORY at n. 17 accompanying text at page 5. The employees were left without their jobs and their pensions.

federal and state oversight that Congress determined was inadequate to protect pensions. S. REP. NO. 93-127 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4842. Such plans would not be subject to any of ERISA's Title I fiduciary requirements. The managers of such plans do not have to meet ERISA's exacting fiduciary and prohibited transaction standards. Instead, they can ignore these rules, leaving participants unprotected from potential abuses and mismanagement.

E. Broad Application Of The Church Plan Exemption Would Deprive Employees Of ERISA's Disclosure Scheme.

Congress also sought to safeguard employee pensions by mandating "disclosure and reporting to participants and beneficiaries of financial and other information" and by requiring that "disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans." 29 U.S.C. § 1001; *see also Subcomm. on Labor of the S. Comm. on Lab. and Pub. Welfare, Legislative History of the Employee Retirement Income Security Act of 1974*: Pub. L. No. 93-406, Vol. III, 4668 (U.S. Gov't. Printing Off. 1976) (stating that the "availability of this information will enable both participants and the Federal Government to monitor the plans' operations..."). By enacting ERISA to provide for accurate, understandable, and timely disclosures, Congress used transparency to ensure that employers would provide the benefits that they

promised employees. *See* 29 U.S.C. § 1001; *Nachman Corp.*, 446 U.S. at 374-75;

ERISA requires that pension plans make certain disclosures to their participants, including: providing them access to the terms of the plan; financial, actuarial and investment information; and other information relating to the management and operation of the plan. *See, e.g.*, 29 U.S.C. §§ 1021-1022, 1024, 1054(h). Plan administrators must furnish certain periodic reports to participants. *See, e.g.*, 29 U.S.C. § 1022(b). In addition, a participant may request certain documents from the plan administrator in writing at any time. 29 U.S.C. § 1024(b)(4). No such requirements apply to church plans.

Similarly, ERISA requires that pension plans make certain disclosures concerning the financial condition and operation of the plan to the Internal Revenue Service, the Department of Labor, and the PBGC. These disclosures provide government agencies with sufficient information to meet their enforcement and oversight obligations under ERISA. *See, e.g.*, 29 U.S.C. §§ 1021, 1023-1024, 1054(h). No such oversight occurs for church plans.

A broad application of the church plan exemption leaves such plans without any obligation to inform participants of the plan's funding status. Indeed, some alleged church plans have admitted that they have not provided their plan participants with ERISA-compliant disclosures. *See, e.g.*, *Rollins v. Dignity Health*, No. 16-258, C.A. Supp. Excerpts of R.

SR-7-23. Without the benefit of disclosures that are accurate and understandable, participants are ill-equipped to make informed decisions concerning their benefits and employment. Significantly, participants do not receive the advantages of government oversight and protection that required disclosures to the government provide.

F. Broad Application Of The Church Plan Exemption Would Deprive Employees Of ERISA's Protections For Benefit Distributions.

To ensure that promised pension benefits are available at retirement, 29 U.S.C. § 1001(a), Congress established rules regulating the form and payment of benefits. For example, to protect the spouses of plan participants, certain plans are required to provide benefit payments in the form of qualified joint and survivor annuities, 29 U.S.C. § 1055(a); *see also Boggs v. Boggs*, 520 U.S. 833, 842-44 (1997) (discussing ERISA's spousal benefits), unless the spouse consents to an alternative form of payment. 29 U.S.C. § 1055(c)(2). ERISA also prohibits the assignment or alienation of benefits, except in the case of a qualified domestic relations order. 29 U.S.C. § 1056(d). A broad application of the church plan exemption leaves such plans with no obligation to provide benefits in this manner, leaving spouses without protection.

G. Broad Application Of The Church Plan Exemption Would Deprive Employees Of ERISA's Protections For Benefit Claims Disputes.

The participant safeguards that Congress enacted include a claims procedure to resolve disputes over benefit claims. 29 U.S.C. § 1133. Section 503 provides that when a participant's claim for benefits has been denied, a benefit plan shall provide adequate written notice to the participant. Such notice must set forth the specific reasons for the denial. And, the notice must be written in a manner to be understood by the participant.[36] *Id.*

Section 503 also states that the plan shall provide the participant with information needed for a meaningful opportunity for a full and fair review of the benefit denial. 29 U.S.C. § 1133. The information must include an adequate explanation of the denial of benefits and a record of what evidence the plan relied upon for its benefit denial. Moreover, the participant must have an opportunity to address the accuracy and reliability of that evidence, and to have the plan consider the participant's evidence prior to reaching its decision. *Grossmuller v. Int'l Union*, UAW, 715 F.2d 853, 858 n.5 (3d Cir. 1983).

A broad application of the church plan

---

[36] Section 503's disclosure requirements are consistent with ERISA's objective of providing full disclosure to participants. 29 U.S.C. § 1001(a). Congress realized that only full disclosure would enable participants to vindicate their rights. *See* S. REP. NO. 93-127 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4863.

exemption leaves such plans with no obligation to offer any dispute resolution process to its participants or to provide a process that is full and fair.

CONCLUSION

For the foregoing reasons, the rulings in favor of the appellants below should be affirmed.

Respectfully submitted,

Mary Ellen Signorille*
William Alvarado Rivera
AARP Foundation
Litigation
601 E Street, NW
Washington, DC 20049
Tel: (202) 434-2072
warivera@aarp.org
msignorille@aarp.org
Counsel for Amici Curiae
AARP and AARP
Foundation
**counsel of record*

Dated: February 23, 2017

RECORD AND BRIEF

FILED
JAN 24 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 16-74, 16-86 & 16-258

IN THE

Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, ET AL., *Petitioners*,

v.

MARIA STAPLETON, ET AL., *Respondents*.

SAINT PETER'S HEALTHCARE SYSTEM, ET AL., *Petitioners*,

v.

LAURENCE KAPLAN, *Respondent*.

DIGNITY HEALTH, ET AL., *Petitioners*,

v.

STARLA ROLLINS, *Respondent*.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third, Seventh, And Ninth Circuits

BRIEF OF *AMICI CURIAE* ALLIANCE DEFENDING FREEDOM AND THOMAS MORE SOCIETY IN SUPPORT OF PETITIONERS

KRISTEN WAGGONER
DAVID CORTMAN
ERIK STANLEY
JORDAN LORENCE
ALLIANCE DEFENDING FREEDOM
440 First Street, NW
Suite 600
Washington, DC 20001
Counsel for Amicus Curiae *Alliance Defending Freedom*

SHAY DVORETZKY
EMILY J. KENNEDY
Counsel of Record
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939
ekennedy@jonesday.com
Counsel for Amici Curiae *Alliance Defending Freedom and Thomas More Society*

Additional Counsel Listed On Inside Cover

Library of Congress

THOMAS BREJCHA
THOMAS MORE SOCIETY
19 South LaSalle Street
Suite 603
Chicago, IL 60603

Counsel for Amicus Curiae
Thomas More Society

TABLE OF CONTENTS

Page

INTEREST OF *AMICI* CURIAE 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

THE FIRST AMENDMENT FAVORS INTERPRETING ERISA'S "CHURCH PLAN" EXEMPTION TO INCLUDE PETITIONERS' PLANS 4

A. Congress Enacted A Broad "Church Plan" Exemption To Protect The First Amendment Rights Of Religious Entities 5

B. Respondents' Interpretation Would Violate The First Amendment's Religion Clauses 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Bill Johnson's Restaurants, Inc. v. N.L.R.B.,
461 U.S. 731 (1983) 5

Bond v. United States,
134 S. Ct. 2077 (2014) 5

Catholic Charities of Maine, Inc. v. City of Portland,
304 F. Supp. 2d 77 (D. Me. 2004) 8

Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,
483 U.S. 327 (1987) 7, 11

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 4

Hernandez v. Comm'r,
490 U.S. 680 (1989) 11

Hooper v. California,
155 U.S. 648 (1895) 4

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.,
132 S. Ct. 694 (2012) 7, 9

Larson v. Valente,
456 U.S. 228 (1982) 10, 11

TABLE OF AUTHORITIES
(continued)

Page(s)

Lockheed Corp. v. Spink,
517 U.S. 882 (1996) 7

Mitchell v. Helms,
530 U.S. 793 (2000) 11

N.L.R.B. v. Catholic Bishop of Chi.,
440 U.S. 490 (1979) 4, 9, 11

N.L.R.B. v. Jones & Laughlin Steel Corp.,
301 U.S. 1 (1937) 4

New York v. Cathedral Acad.,
434 U.S. 125 (1977) 11

Rinehart v. Life Ins. Co. of N. Am.,
No. C08-5486, 2009 WL 995715
(W.D. Wash. Apr. 14, 2009) 8

Serbian E. Orthodox Diocese for U.S.A. & Canada v. Milivojevich,
426 U.S. 696 (1976) 6

Thorkelson v. Publ'g House of the Evangelical Lutheran Church in Am.,
764 F. Supp. 2d 1119
(D. Minn. 2011) 8

United States v. Lamont,
330 F.3d 1249 (9th Cir. 2003) 2

STATUTES

29 U.S.C. § 1002 ..... 2, 3

29 U.S.C. § 1003 ..... 2, 6

TABLE OF AUTHORITIES
(continued)

Page(s)

29 U.S.C. § 1321 2

42 U.S.C. § 2000bb-1 9

Pub. L. No. 93-406 2

Pub. L. No. 96-364 2

OTHER AUTHORITIES

125 Cong. Rec. 10052 (1979) 7, 8, 10

R. Douglas Brackenridge & Lois A. Boyd, *Presbyterians and Pensions: The Roots and Growth of Pensions in the Presbyterians Church (U.S.A.)* (1988) 5, 6

DOL Advisory Op. 94–04A (Feb. 17, 1994) 8

I.R.S. Priv. Ltr. Rul. 9446037, 1994 WL 648763 (Nov. 18, 1994) 8

IRS Gen. Counsel Mem. 37,266, 1977 WL 46200 (Sept. 22, 1977) 11

IRS Gen. Counsel Mem. 39,007, 1983 WL 197946 (July 1, 1983) 8

IRS Publication 1828, *Tax Guide for Churches and Religious Organizations* (Aug. 2015) 2

S. Ct. R. 37.6 1

S. Rep. No. 93-383 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889 ..... 6, 7, 12

TABLE OF AUTHORITIES
(continued)

Page(s)

2 Luke Tyerman, *The Life and Times of the Rev. John Wesley, M.A., Founder of the Methodists* (1998) 6

INTEREST OF *AMICI CURIAE*[1]

Alliance Defending Freedom ("ADF") is a non-profit organization devoted to the defense and advocacy of religious freedom. ADF regularly serves as counsel or *amicus curiae* in cases concerning religious liberties.

Thomas More Society is a non-profit, national public interest law firm dedicated to restoring respect in law for religious liberty. It accomplishes its mission through litigation, education, and related activities.

Many of *amici*'s clients are church agencies or other religious organizations that, like Petitioners Advocate Health Care Network, Saint Peter's Healthcare System, and Dignity Health, have long maintained their pension plans as church plans. Under Respondents' approach, these entities may be forced to alter their ecclesiastical structures or to succumb to extensive government entanglement. They may also face crippling financial penalties that would undermine or destroy their ability to carry out their religious mission. *Amici* thus have a substantial interest in the resolution of this case.

---

[1] Letters granting blanket consent from all parties are on file with the Clerk. Pursuant to Rule 37.6, counsel for *amici* certify that no counsel for any party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

ERISA's requirements have never applied to "church plans." *See* Pub. L. No. 93-406; *see also* 29 U.S.C. §§ 1003(b)(2), 1321(b)(3); Pub. L. No. 96-364, § 407 (1980 amendments expanding definition of "church plan"). ERISA defines a "church plan" as "a plan established and maintained ... for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of title 26." 29 U.S.C. § 1002(33)(A).[2] ERISA defines "employee," in turn, to include employees of both churches themselves and tax-exempt organizations that are "controlled by or associated with a church or a convention or association of churches." *Id.* § 1002(33)(C)(ii). The statute further provides that a church plan:

> includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such

---

[2] ERISA's use of the word "church" is imported from the Tax Code and thus, consistent with the Tax Code, includes temples, synagogues, mosques, and other houses of worship. *See* IRS Publication 1828, *Tax Guide for Churches and Religious Organizations* (Aug. 2015); *cf. United States v. Lamont*, 330 F.3d 1249, 1254 & n.3 (9th Cir. 2003) (using word "church" to refer to "all structures meant for religious worship, including synagogues, other temples, and mosques").

> organization is controlled by or associated with a church or a convention or association of churches.

Id. § 1002(33)(C)(i).

The question in these cases is whether this exemption applies to plans established by entities controlled by or associated with a church (so-called "church agencies"). For the past 30 years, the government agencies tasked with administering this exemption—the IRS and the DOL—consistently and repeatedly have concluded that the answer is "yes," prompting religious organizations like Petitioners to maintain their plans in good-faith reliance on those agencies' guidance.

The Third, Seventh, and Ninth Circuits upset the settled expectations of countless religious entities by holding that their plans fall outside the scope of ERISA's exemption because they were not established directly by a house of worship. In addition to being contrary to the text and structure of the statute, that interpretation of ERISA raises serious constitutional concerns. Those concerns are exacerbated by the staggering financial penalties that religious organizations may face as a result of the decisions below—penalties that threaten to cripple the ability of such charities to carry out their religious missions. This Court should reverse the decisions below and confirm that the church-plan exemption encompasses plans established by Petitioners and other church agencies.

ARGUMENT

THE FIRST AMENDMENT FAVORS INTERPRETING ERISA'S "CHURCH PLAN" EXEMPTION TO INCLUDE PETITIONERS' PLANS

It is a "cardinal principle" of statutory construction that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *N.L.R.B. v. Catholic Bishop of Chi.*, 440 U.S. 490, 500 (1979). Accordingly, "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a court's] plain duty is to adopt that which will save the act." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895).

This Court has consistently applied these principles to construe statutes in a manner that avoids "infring[ing] [upon] constitutionally protected liberties." *DeBartolo*, 485 U.S. at 575. For example, in *Catholic Bishop*, the Court acknowledged that the language of the National Labor Relations Act was "very broad," but nevertheless refused to apply it to teachers working in church-operated schools. 440 U.S. at 504; *see id.* at 507. Doing so, the Court explained, would present "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Id.* at 507. This Court has followed the same approach in other cases.

See, e.g., *Bond v. United States*, 134 S. Ct. 2077, 2093 (2014) (construing statute to avoid disruption to constitutional balance between state and federal power); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 743 (1983) (rejecting rational interpretation of statute that would infringe upon First Amendment rights and state interests).

This fundamental rule counsels in favor of construing ERISA's exemption to include Petitioners' plans. An interpretation that exempts plans maintained by entities controlled by or associated with houses of worship—which courts and government agencies have found reasonable for over 30 years—protects such church agencies' First Amendment rights. Respondents' interpretation of the exemption, by contrast, impermissibly infringes upon these rights—a concern that is exacerbated by the crippling financial penalties that the decisions below threaten to impose.

A. Congress Enacted A Broad "Church Plan" Exemption To Protect The First Amendment Rights Of Religious Entities

Religious entities have provided retirement benefits to their workers for centuries. For example, in 1717, the Presbyterian Church in Philadelphia established a "Fund for Pious Uses" intended to provide financial assistance to ministers and their families. R. Douglas Brackenridge & Lois A. Boyd, *Presbyterians and Pensions: The Roots and Growth of Pensions in the Presbyterian Church (U.S.A.)* 7 (1988). Similarly, the Methodist Church established the "Preacher's Fund" in 1763 to provide for the needs of "old or sickly preachers and their families," as well as "for the widows and children of those that

are dead." 2 Luke Tyerman, *The Life and Times of the Rev. John Wesley, M.A., Founder of the Methodists* 772-73 (1998). These funds were often inextricably related to the church's religious mission; indeed, the Presbyterian Church "pledged financial support so that ministers could devote all their energy to ecclesiastical duties." Brackenridge & Boyd, *supra*, at 7. By providing financial assistance to ministers' widows and children, churches sought to ensure that their ministers would provide "forceful leadership" throughout their lives. *Id.*

By the time ERISA was enacted in 1974, houses of worship had been providing pension benefits for nearly 300 years. Congress recognized that imposing ERISA's requirements on these entities, including "the examination[] of books and records," "might be regarded as an unjustified invasion" of "churches and their religious activities." S. Rep. No. 93-383, at 81 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4965. In light of these serious First Amendment implications, Congress included a provision exempting church plans from ERISA's requirements. *See* 29 U.S.C. § 1003(b)(2).

Congress's concerns were well-founded. "[R]eligious freedom encompasses the power of religious bodies to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Serbian E. Orthodox Diocese for U.S.A. & Canada v. Milivojevich*, 426 U.S. 696, 721-22 (1976) (internal quotation marks omitted). The First Amendment's Religion Clauses thus prohibit the government from "interfer[ing] with the internal governance of the church" and "protect[] a religious group's right to

shape its own faith and mission." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012). This freedom includes the freedom to make "internal church decision[s]." *Id.* at 707.

Congress was rightly concerned that trolling through religious entities' records or forcing them to alter decisions about the funding of their pension plans would impermissibly invade these entities' constitutional rights. *See* S. Rep. No. 93-383, at 81, 1974 U.S.C.C.A.N. at 4965; 125 Cong. Rec. 10052 (1979); *cf. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring) ("[The] prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity."). Moreover, ERISA's requirements apply only when an employer *chooses* to provide a benefits plan. Synagogues, mosques, churches, and other houses of worship should not be forced to decide between ceasing to provide retirement benefits and subjecting themselves to extensive government regulation of their internal operations. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) ("Nothing in ERISA requires employers to establish employee benefits plans."). The First Amendment protects religious entities from having to make such a choice. *See, e.g., Hosanna-Tabor*, 132 S. Ct. at 706; S. Rep. No. 93-383, at 81, 1974 U.S.C.C.A.N. at 4965.

These same considerations apply to the *agencies* of churches, synagogues, mosques, and other houses of worship. Indeed, "[c]hurch agencies are essential to the churches' mission[s]" and "are, in fact, part of

the churches." 125 Cong. Rec. 10052 (Sen. Talmadge). And Congress amended the church plan exemption in 1980 to ensure that such entities would be able to avoid invasive regulation under ERISA. As Senator Talmadge, a co-sponsor of the amendment, explained, "If we have enacted a statute that may require the church plans to come under ERISA, file reports, [and] be subject to the examination of books and records ... it must be changed because we have clearly created an excessive Government entanglement with religion." *Id.* (without a broad church plan exemption, "ministers and lay employees will not be able to pursue their missions nearly as freely as they have in the past").

For these reasons, construing ERISA's exemption to include plans established by church agencies effectuates Congress's purpose in enacting the amendment and protects religious entities' First Amendment rights. This interpretation is eminently reasonable, as reflected by decades of court decisions and administrative agency opinion letters that have concluded that plans established by agencies of houses of worship are exempt from ERISA. *See, e.g.*, *Thorkelson v. Publ'g House of the Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 1125 (D. Minn. 2011); *Rinehart v. Life Ins. Co. of N. Am.*, No. C08-5486, 2009 WL 995715, at *3 (W.D. Wash. Apr. 14, 2009); *Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77, 85-86 (D. Me. 2004); IRS Gen. Counsel Mem. 39,007, 1983 WL 197946, at *1, 5-6 & n.1 (July 1, 1983); DOL Advisory Op. 94–04A (Feb. 17, 1994); I.R.S. Priv. Ltr. Rul. 9446037, 1994 WL 648763 (Nov. 18, 1994).

B. Respondents' Interpretation Would Violate The First Amendment's Religion Clauses

Respondents' contrary view—that ERISA does not exempt plans established by church agencies—"give[s] rise to serious constitutional questions." *Catholic Bishop*, 440 U.S. at 501.

First, by limiting the exemption to plans established by churches, Respondents' interpretation impermissibly interferes with a religious entity's "internal governance" and "right to shape its own faith and mission." *Hosanna-Tabor*, 132 S. Ct. at 706. This freedom includes the ability to make "internal church decision[s]" such as whether the church prefers one of its agencies to establish and maintain a benefits plan. *See id.* at 707. For various reasons—including ones pertaining to ecclesiastical doctrine—a church, synagogue, or mosque may establish its agencies as separate entities. By excluding plans established by such church agencies from ERISA's exemption, Respondents' approach would impermissibly force houses of worship to choose between reorganizing themselves—potentially in a way that is inconsistent with their beliefs—and jeopardizing their agencies' ability to provide for retired employees. The Free Exercise Clause prohibits this intrusion upon "a religious group's right to shape its own faith and mission." *Id.* at 706; *see also* 42 U.S.C. § 2000bb-1(a) (providing that "Government shall not substantially burden a person's exercise of religion").

Second, and relatedly, Respondents' reading violates "[t]he clearest command of the Establishment Clause": "that one religious

denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). In *Larson*, this Court invalidated a statute imposing certain requirements on religious organizations that received more than half of their funding from non-members. *Id.* at 255. The statute, *Larson* explained, impermissibly distinguished between "well-established churches" with strong financial support from their members and "churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members." *Id.* at 246 n.23 (internal quotation marks omitted).

Respondents' interpretation of the church plan exemption runs afoul of the Establishment Clause for the same reason. Whether or not a house of worship establishes a plan for its agencies' employees often hinges on whether it belongs to a congregational or hierarchical denomination. *See* 125 Cong. Rec. 10052 (Sen. Talmadge). By extending ERISA's exemption to some church agencies (*i.e.*, those whose plans are established by a house of worship) and denying it to others (*i.e.*, those whose plans are established by either the agency itself or a church's national pension board), Respondents' approach would impermissibly discriminate between denominations.

Third, Respondents' interpretation would require courts to engage in constitutionally suspect inquiries into whether an entity is sufficiently religious to be considered a "church" or equivalent house of worship. Indeed, before Congress expanded ERISA's exemption in 1980, the IRS did just that. *See, e.g.*,

IRS Gen. Counsel Mem. 37,266, 1977 WL 46200, at *3-6 (Sept. 22, 1977) (analyzing eligibility of Catholic nun order by examining the religious nature of the organization's primary activities). But "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977); *see Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality) ("It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs."); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."). Not only would this process "result[] in considerable ongoing government entanglement in religious affairs," *Amos*, 483 U.S. at 343 (Brennan, J., concurring); *see also Catholic Bishop*, 440 U.S. at 502; it also would favor overtly devout religious organizations over those that appear less orthodox, violating the Establishment Clause's command of neutrality, *see Larson*, 456 U.S. at 244. Respondents' narrow construction thus resurrects the constitutional problems that Congress acted in 1980 to correct.

Finally, on top of all of these concerns, religious organizations may face staggering financial penalties if Respondents' view prevails. Collectively, Respondents allege that Petitioners owe over $11 billion to nearly 100,000 putative class members. Those penalties threaten to cripple the ability of

countless charities to carry out their religious missions. That is not what Congress intended when it enacted an exemption designed to protect "religious activities." S. Rep. No. 93-383, at 81, 1974 U.S.C.C.A.N. at 4965.

CONCLUSION

For the reasons stated above, the decisions below should be reversed.

Respectfully submitted,

KRISTEN WAGGONER
DAVID CORTMAN
ERIK STANLEY
JORDAN LORENCE
ALLIANCE DEFENDING FREEDOM
440 First Street, NW
Suite 600
Washington, DC 20001

Counsel for Amicus Curiae *Alliance Defending Freedom*

SHAY DVORETZKY
EMILY J. KENNEDY
Counsel of Record
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939
ekennedy@jonesday.com

Counsel for Amici Curiae *Alliance Defending Freedom and Thomas More Society*

THOMAS BREJCHA
THOMAS MORE SOCIETY
19 South LaSalle Street
Suite 603
Chicago, IL 60603

Counsel for Amicus Curiae *Thomas More Society*

JANUARY 24, 2017

AND 1
BRIEF

Nos. 16-74, 16-86, 16-258

FILED
JAN 24 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, ET AL.,
Petitioners,

v.

MARIA STAPLETON, ET AL.
Respondents.

(Caption continued on inside cover)

On Writs of Certiorari to the
United States Courts of Appeals
for the Seventh, Third, and Ninth Circuits

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
WALTER M. WEBER
AMERICAN CENTER FOR
LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org
Counsel for Amicus Curiae

No. 16-86

SAINT PETER'S HEALTHCARE SYSTEM, ET AL.,
Petitioners,

v.

LAURENCE KAPLAN,
Respondent.

No. 16-258

DIGNITY HEALTH, ET AL.,
Petitioners,

v.

STARLA ROLLINS,
Respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. CONTRA FFRF, RELIGIOUS EXEMPTIONS DO NOT VIOLATE THE ESTABLISHMENT CLAUSE. 2

II. CONTRA AU, THE ERISA CHURCH PLAN EXEMPTION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE BY BURDENING THIRD PARTIES. 4

CONCLUSION 10

TABLE OF AUTHORITIES

Cases	Page
Bhd. of Locomotive Engineers v. Atchison, Topeka & Santa Fe R.R., 516 U.S. 152 (1996)	7
Board of Educ. v. Grumet, 512 U.S. 687 (1994)	5
Branzburg v. Hayes, 408 U.S. 665 (1972))	9
Comm'r of Internal Revenue v. Kowalski, 434 U.S. 77 (1977)	7
Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987)	3, 5, 8
Cutter v. Wilkinson, 544 U.S. 709 (2005)	3, 5
Employment Div. v. Smith, 494 U.S. 872 (1990)	4
Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985)	5
Gillette v. United States, 401 U.S. 437 (1971)	2, 3, 5
Gobielle v. Liberty Mut. Ins. Co., 136 S. Ct. 936 (2016)	6
Hosanna-Tabor Evangelical Lutheran Church v. EEOC, 565 U.S. 171 (2012)	3
Kilby v. CVS Pharm., Inc., 739 F.3d 1192 (9th Cir. 2013)	7

Locke v. Davey, 540 U.S. 712 (2004) 3

Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) 7

NRLB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 4

Pleasant Grove City v. Summum, 555 U.S. 460 (2009) 1

Sherbert v. Verner, 374 U.S. 398 (1963) 8

Town of Greece v. Galloway, 134 S. Ct. 1811 (2014) 1

Walz v. Tax Comm'n, 397 U.S. 664 (1970) 3

Wisconsin v. Yoder, 406 U.S. 205 (1972) 8

Constitutional and Statutory Provisions

U.S. Const. amend. I ..... 1, *passim*

U.S. Const. amend. IV 9

U.S. Const. amend. VIII 9

22 U.S.C. § 288 7

29 U.S.C. § 1002(32) 6

29 U.S.C. § 1003(b)(1) 6

RFRA, 42 U.S.C. § 2000bb et seq. 3, 4, 5

RLUIPA, 42 U.S.C. § 2000cc et. seq. 3, 4, 5

Other Authorities

David Brang *et al.*, "Apotemnophilia: a neurological disorder," 19 *NeuroReport* 1305 (2008) 8

Female Genital Mutilation, WHO media centre fact sheet (Feb. 2014) 8

Thomas Jefferson, "Reply to Address to the Society of the Methodist Episcopal Church at New London, Connecticut," Feb. 4, 1809, in *The Complete Jefferson* (S.K. Padover, ed. 1943) 8

Jonathan D. Sarna, "Constitutional Dilemma on Birth Control," *Forward.com* (Mar. 16, 2012) . 8

INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), addressing a variety of issues of constitutional law. The ACLJ is dedicated, *inter alia*, to religious liberty. In this brief, the ACLJ responds preemptively to arguments that the church plan exemption in ERISA is unconstitutional under the Establishment Clause.

SUMMARY OF ARGUMENT

The religious protection embodied in the First Amendment leaves ample room for exemptions that accommodate religious persons, practices, and institutions beyond the bare minimum which the Free Exercise Clause requires. Offering a buffer of protection to religion in this way is not unconstitutional favoritism. Rather, it is the American way. Hence, there is no Establishment Clause violation that might provide an alternative basis for affirmance in these cases. This Court should reverse

---

[1] The parties in these consolidated cases have consented to the filing of this brief. Copies of the blanket consent letters of the parties are on file with this Court. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

the judgments of the Third, Seventh, and Ninth Circuits.

ARGUMENT

"'Neutrality' in matters of religion is not inconsistent with 'benevolence' by way of exemptions from onerous duties," *Gillette v. United States*, 401 U.S. 437, 454 (1971). The ERISA church plan exemption spares religious employers from massive financial and other burdens, falling squarely within the *Gillette* statement. Nevertheless, some amici have argued that this exemption is unconstitutional. In appellate-level amicus briefs (in particular, recently in the Tenth Circuit[2]), Americans United for Separation of Church and State (AU), joined by the American Civil Liberties Unions (ACLU) [hereafter jointly "AU"], and separately the Freedom From Religion Foundation (FFRF), each argue that the ERISA church plan exemption violates the Establishment Clause. Both AU and the FFRF are incorrect.

I. CONTRA FFRF, RELIGIOUS EXEMPTIONS DO NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The FFRF argument can be dismissed out of hand. FFRF contends that the Establishment Clause flatly "prohibits the government from treating religious organizations preferentially," FFRF 10th Br. at 2, or at

---

[2]*See* Br. of Americans United for Separation of Church and State & ACLU, *Medina v. Catholic Health Initiatives*, No. 16-1005 (10th Cir. June 29, 2016) [hereafter "AU 10th Br."]; Br. of FFRF, *Catholic Health Initiatives v. Medina* [sic], No. 16-1005 (10th Cir. June 29, 2016) [hereafter "FFRF 10th Br."].

least when not necessary to avoid a substantial Free Exercise burden or excessive government entanglement with sacred matters," *id.* at 4. In short, the FFRF rule is, in effect, "No more protection for religion than necessary."

This Court has repeatedly rejected FFRF's contention. Instead, this Court has recognized that there is "play in the joints" in the First Amendment: "room" exists between what the Free Exercise Clause requires and what the Establishment Clause forbids. *Locke v. Davey*, 540 U.S. 712, 718 (2004) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)).[3] And thus, this Court has again and again upheld various exemptions that protect – or "benefit," in FFRF's loaded phrasing – religious entities: tax exemptions (as in *Walz*); exemptions from employment discrimination laws (as in *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), and *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171 (2012)); and entitlement to "strict scrutiny" review of substantial burdens on religious exercise (as in the federal RFRA and RLUIPA statutes and their state counterparts, *see generally Cutter v. Wilkinson*, 544 U.S. 709 (2005)). Not every one of these exemptions or protections are "necessary," strictly speaking, to prevent Free Exercise or entanglement violations. *Amos*, for example, dealt with "the *secular*, nonprofit activities" of a religious employer, 483 U.S. at 329 (emphasis added). RFRA

---

[3]The "play in the joints" also includes considerable legislative flexibility in deciding *how far* to protect religious exercise beyond the basic constitutional requirements. *See Gillette*, 401 U.S. at 448-60 (upholding exemption protecting, but limited to, those religious objectors who hold a belief forbidding participation in *all* wars).

and RLUIPA, meanwhile, followed a declaration from this Court that the Free Exercise Clause did *not* generally require strict scrutiny, *Employment Div. v. Smith*, 494 U.S. 872, 878-82 (1990); hence, both RFRA and RLUIPA necessarily represent *extensions* of legal protection beyond the Free Exercise minimum. Yet this Court perceived no Establishment Clause obstacle to such protections.

Indeed, this Court itself created a protective exemption for religious entities by means of statutory construction in *NRLB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (National Labor Relations Act construed not to apply to church-operated schools). This Court did so under the rubric of avoiding serious constitutional questions. *Id.* at 500-07. If exemptions for religious entities were themselves constitutionally problematic, it would have made no sense to read precisely such an exemption into a statute in order to *avoid* serious constitutional questions. In short, FFRF's reading of the Establishment Clause is not just erroneous, but exactly backwards from the approach this Court took in *Catholic Bishop*.

II. CONTRA AU, THE ERISA CHURCH PLAN EXEMPTION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE BY BURDENING THIRD PARTIES.

Unlike FFRF, AU makes a more nuanced constitutional argument, namely that exemptions for religious entities violate the Establishment Clause only if they "unduly burden" third parties. AU 10th Br. at 4. This argument, however, also fails.

First of all, an *exemption* does not *require* anything. Hence, any impact on third parties will not

be a government-imposed impact, but rather the result of the discretionary choices of private actors. That distinction can be decisive. *Amos*, 483 U.S. at 337 n.15 ("it was the Church . . ., and not the Government," that "impinged" upon the employee's choice). *See generally* Br. of Amici Christian Legal Soc'y et al. (distinguishing "exemptions" from "preferences").[4]

Second, even to the extent the Court does take into account the effects an exemption will have on third parties, *Cutter*, 544 U.S. at 720 (applying statutory exemption); *Board of Educ. v. Grumet*, 512 U.S. 687, 722 (1994) (Kennedy, J., concurring in judgment), the standard for what burdens are "too much" is quite high. Suffering religious discrimination is not "too much." *Amos*. Even being required to serve (in place of a conscientious objector) in the military in wartime, at risk of life and limb, is not "too much." *Gillette*. *See also Grumet*, 512 U.S. at 724-25 (Kennedy, J., concurring in judgment) (citing *Amos* and *Gillette* as upholding laws under the Establishment Clause despite these "substantial" burdens on third parties).

---

[4]The Free Exercise Clause, RFRA, RLUIPA, the church autonomy doctrine, etc., like the church plan exemption under ERISA, all protect religious practice from *governmental* burdens. These situations are therefore quite unlike the case of *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), in which the government empowered all employees with an absolute right (viz., to take off work on the Sabbath of their choosing) enforceable against *private* actors. *Id.* at 710 (noting that the First Amendment does not confer a right to insist that all others, including private parties, conform their practices to one's own religious practices).

Having an arguably less favorable[5] retirement plan is therefore not even close to being constitutionally problematic, as the financial impact, while certainly significant, falls well below the burdens at issue – and tolerated – in those other cases.

Third, the burden on employees of church plan employers is no different than that faced by the millions of government employees whose employers are also exempt under ERISA. ERISA contains an exception for "a governmental plan," 29 U.S.C. § 1003(b)(1), the definition of which includes plans covering federal, state, and local government employees, 29 U.S.C. § 1002(32). Moreover, the "governmental plan" exemption extends still further:

> The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act (59 Stat. 669).

29 U.S.C. § 1002(32). The exemption for "international organizations" covers a wide range of additional employers such as the International Coffee Organization, the International Committee of the Red

---

[5] *But see Gobielle v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016) ("ERISA does not guarantee substantive benefits"). Moreover, to the extent the imposition of ERISA obligations induce employers to resort to alternative retirement benefits – or a reduction in force – the net result need not be a benefit to any given employee.

Cross, the United Nations, the World Health Organization, the Israel-United States Binational Industrial Research and Development Foundation, and a host of other employers.[6] It is hard to see how a burden on all these employees could be perfectly acceptable as a policy matter, yet somehow become a constitutional crisis when applied to religious healthcare.

Fourth, the concerns AU identifies must be placed in their proper context, namely, that inconveniences and burdens to employees are part and parcel of the employment context. A dress code denies the freedom to dress as one chooses. *E.g.*, *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282 (1977) (employee criticizing workplace dress code). Finite salaries deny employees money beyond their agreed pay. *E.g.*, *Comm'r of Internal Revenue v. Kowalski*, 434 U.S. 77, 81 (1977) (amount of salary subject to labor negotiation). Fixed work shifts deny employees the freedom to work the hours they choose. *E.g.*, *Bhd. of Locomotive Engineers v. Atchison, Topeka & Santa Fe R.R.*, 516 U.S. 152, 158 (1996) (noting fatigue likely to result from 12-hour shift). The physical layout of an office will deny employees the space, window views, or furniture arrangements they might prefer. *E.g.*, *Kilby v. CVS Pharm., Inc.*, 739 F.3d 1192, 1194 (9th Cir. 2013) (noting role of "business judgment" in determining the "physical layout of the workplace"). That employees do not always get what they deem to

---

[6]The list of these organizations is at 22 U.S.C. § 288. *See* https://www.gpo.gov/fdsys/pkg/USCODE-2014-title22/pdf/USCODE-2014-title22-chap7-subchapXVIII.pdf.

be optimum benefits and conditions is not remarkable, but rather a fact of life.

Fifth, the mischaracterization (*see Amos*, 483 U.S. at 337 n.15) of religious exemptions as imposing burdens upon third parties is a charge that knows no limits. The employee who refuses a Sabbath shift imposes upon his employer or, perhaps, co-workers who need to fill in. *But see Sherbert v. Verner*, 374 U.S. 398 (1963). The parents who remove their Amish child from formal high school education deny that child the instruction that would otherwise be given. *But see Wisconsin v. Yoder*, 406 U.S. 205 (1972). The owners of a kosher deli who refuse to sell pork deny their patrons the option of a ham sandwich. *But see* Jonathan D. Sarna, "Constitutional Dilemma on Birth Control," *Forward.com* (Mar. 16, 2012) ("We all might agree that kosher delis should not be coerced into selling ham"). And the physician who refuses to perform a "female circumcision," *see* Female Genital Mutilation, WHO media centre fact sheet (Feb. 2014), or an unnecessary amputation, *see* David Brang *et al.*, "Apotemnophilia: a neurological disorder," 19 *NeuroReport* 1305 (2008) (disorder characterized by intense desire for amputation of healthy limb), each "impose" upon the would-be recipients of those procedures (or their parents).

Accommodating religious beliefs always entails some measure of sacrifice. But respect for conscience is a first principle of our civil society, not a negotiable perk. If what Thomas Jefferson wrote in 1809 is to remain true – that "no provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority," Thomas Jefferson, "Reply to Address to the Society of the Methodist Episcopal Church at New

London, Connecticut," Feb. 4, 1809, in *The Complete Jefferson* (S.K. Padover, ed. 1943) – then the Establishment Clause must tolerate inconveniences to third parties in the name of respecting protections for religious freedom.

Sixth and finally, the AU's proposed "unduly harm" test is a label for a result, not a standard for adjudication. All of the analytical force is packed into the term "unduly," which is essentially a judgment call about competing values. In a representative democracy, weighing the balance of such value judgments is not the task of the judiciary, under the guise of constitutional interpretation, absent clear textual authorization, *compare* U.S. Const. amend. IV ("unreasonable" searches and seizures); U.S. Const. amend. VIII ("excessive" fines). Rather, such value judgments are the responsibility of the representative, legislative branches of government. *Branzburg v. Hayes*, 408 U.S. 665, 705-06 (1972).

CONCLUSION

This Court should reverse the judgments of the Third, Seventh, and Ninth Circuits.

Respectfully submitted,

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
Walter M. Weber
American Center for
Law & Justice
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org

Jan. 24, 2017